# UNITED STATES REPORTS
## VOLUME 429

CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1976

(Beginning of Term)

October 4, 1976, Through February 22, 1977

Together With In-vacation Dismissals and Opinions
of Individual Justices in Chambers

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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## ERRATA

336 U. S. 538, line 4: "541" should be "511".

395 U. S. 376, line 5: "cacaphony" should be "cacophony".

415 U. S. 908, No. 73-235: In lieu of the second sentence substitute the following: "Motion of Equal Employment Opportunity Commission for leave to file a brief as *amicus curiae* denied. Motions of Chamber of Commerce of the United States and American Bar Assn. for leave to file briefs as *amici curiae* granted."

421 U. S. 774, line 13: "Pp. 785-788" should be "Pp. 786-788".

428 U. S. 463, line 2: "opposite" should be "apposite".

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
POTTER STEWART, ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.

RETIRED

STANLEY REED, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
TOM C. CLARK, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

EDWARD H. LEVI, ATTORNEY GENERAL.[1]
GRIFFIN B. BELL, ATTORNEY GENERAL.[2]
ROBERT H. BORK, SOLICITOR GENERAL.[3]
MICHAEL RODAK, JR., CLERK.
HENRY PUTZEL, jr., REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
BETTY J. CLOWERS, ACTING LIBRARIAN.

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*For notes, see p. IV.

## NOTES

[1] Attorney General Levi resigned effective January 20, 1977, on which date Assistant Attorney General Thornburgh became Acting Attorney General.

[2] The Honorable Griffin B. Bell, of Georgia, was nominated to be Attorney General by President Carter on January 20, 1977; the nomination was confirmed by the Senate on January 25, 1977; he was commissioned on January 26, 1977, and took the oath on the same date.

[3] Solicitor General Bork resigned effective January 20, 1977, on which date Deputy Solicitor General Friedman became Acting Solicitor General.

# SUPREME COURT OF THE UNITED STATES

## Allotment of Justices

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, **Warren E. Burger**, Chief Justice.

For the First Circuit, **William J. Brennan, Jr.**, Associate Justice.

For the Second Circuit, **Thurgood Marshall**, Associate Justice.

For the Third Circuit, **William J. Brennan, Jr.**, Associate Justice.

For the Fourth Circuit, **Warren E. Burger**, Chief Justice.

For the Fifth Circuit, **Lewis F. Powell, Jr.**, Associate Justice.

For the Sixth Circuit, **Potter Stewart**, Associate Justice.

For the Seventh Circuit, **John Paul Stevens**, Associate Justice.

For the Eighth Circuit, **Harry A. Blackmun**, Associate Justice.

For the Ninth Circuit, **William H. Rehnquist**, Associate Justice.

For the Tenth Circuit, **Byron R. White**, Associate Justice.

December 19, 1975.

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(For next previous allotment, see 404 U. S., p. v.)

# SUPREME COURT OF THE UNITED STATES

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For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 419 U. S., p. v.)

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1976

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## UNITED STATES *v.* MORRISON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75–1534. Decided October 12, 1976

The District Court's general finding of guilt in a bench trial is for double jeopardy purposes the same as a jury verdict of guilty. The Government is therefore entitled, pursuant to the Criminal Appeals Act, to appeal the District Court's subsequent order suppressing certain evidence on reconsideration of respondent's pretrial motion, which was originally denied, since success on that appeal would result in reinstatement of the District Court's general finding of guilt, rather than in further factual proceedings relating to guilt or innocence. *United States* v. *Wilson,* 420 U. S. 332.

Certiorari granted; vacated and remanded.

PER CURIAM.

On September 27, 1972, a car driven by respondent was stopped by Border Patrol agents at the permanent immigration traffic checkpoint near Truth or Consequences, N. M. An agent detected the odor of marihuana; the car was then searched, disclosing a large quantity of marihuana.

Respondent was charged with possessing marihuana with intent to distribute in violation of 21 U. S. C. § 841 (a)(1). He filed a pretrial motion to suppress the marihuana on the ground that the search of his car violated the Fourth Amendment. He waived his right to a jury trial. The motion to suppress was heard during the trial on the merits, and the District Court denied the motion to suppress and found the respondent guilty as charged.

Approximately three months later, we held that a warrantless roving patrol search of vehicles for aliens, conducted without probable cause at a point removed from the border or its functional equivalent, violated the Fourth Amendment. *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). The Court of Appeals for the Tenth Circuit thereafter held that *Almeida-Sanchez* should be applied retroactively and that its rationale encompasses searches conducted at fixed traffic checkpoints. *United States* v. *King*, 485 F. 2d 353 (1973); *United States* v. *Maddox*, 485 F. 2d 361 (1973).

Respondent's original motion to suppress was then reconsidered by the District Court[1] in the light of *King, supra,* and *Maddox, supra,* and the following order was entered:

> "[I]t is hereby
>
> "ORDERED that the marihuana which is the subject matter of the charge herein shall be and is hereby suppressed.
>
> "The Court will take appropriate action consistent with this Order if this Order is not appealed by the United States of America or if this Order is affirmed on appeal."

Thereupon the Government appealed pursuant to 18 U. S. C. § 3731.[2] While this appeal was pending in the

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[1] At that time, this case was still pending before the court for sentencing.

[2] The Criminal Appeals Act provides in pertinent part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Court of Appeals, we held in *Bowen* v. *United States,* 422 U. S. 916 (1975); *United States* v. *Peltier,* 422 U. S. 531 (1975), that *Almeida-Sanchez* was not to be applied retroactively to Border Patrol searches conducted prior to June 21, 1973. After the Government moved for summary reversal of the District Court's suppression order, the Court of Appeals, without benefit of briefing or oral argument, dismissed the Government's appeal for lack of jurisdiction, finding that double jeopardy would bar a retrial. The court, citing *United States* v. *Jenkins,* 420 U. S. 358 (1975), felt that double jeopardy would bar because further proceedings involving "the resolution of factual issues going to the elements of the offense charged . . ." would be required.

We cannot agree. In *United States* v. *Wilson,* 420 U. S. 332 (1975), we held:

> "[W]hen a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." *Id.,* at 352–353.

The holding in *Wilson* applies to the bench trial here, for, as we stated in *United States* v. *Jenkins, supra:*

> "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge. . . .
>
> "A general finding of guilt by a judge may be analogized to a verdict of 'guilty' returned by a jury." 420 U. S., at 365–366.

Thus the District Court's general finding of guilt here is for double jeopardy purposes the same as a jury verdict of guilty. The Government is therefore entitled to appeal the order suppressing the evidence, since success on that appeal would result in the reinstatement of the general finding of guilt, rather than in further factual proceedings relating to guilt or innocence. As in *Wilson*, there would then remain only the imposition of sentence and the entry of a judgment of conviction pursuant to Fed. Rule Crim. Proc. 32.

We grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand for further proceedings consistent with this opinion.

*It is so ordered.*

# UNITED STATES *v.* ROSE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75-1535. Decided October 12, 1976

After the District Court had found respondent guilty at a bench trial, double jeopardy did not bar the Government's appeal from the District Court's order suppressing certain evidence, entered upon reconsideration of respondent's motion to suppress, which was originally denied. *United States* v. *Morrison, ante,* p. 1.

Certiorari granted; vacated and remanded.

PER CURIAM.

The operative facts herein are substantially identical to those in *United States* v. *Morrison, ante,* p. 1. Respondent's car was stopped by Border Patrol agents; a search disclosed marihuana. Respondent lost a motion to suppress and was found guilty after a bench trial. Following this trial, but before sentencing, the District Court, relying upon our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), granted respondent's motion to suppress. The Court of Appeals for the Tenth Circuit, as it did in *Morrison,* found the Government's appeal barred by double jeopardy.

In *United States* v. *Wilson,* 420 U. S. 332 (1975), we held that double jeopardy would not bar a Government appeal if success on that appeal would result in the reinstatement of a verdict of guilty. The fact that the order of suppression here occurred after a general finding of guilt rendered by the court in a bench trial, rather than after a return of a verdict of guilty by a jury, is immaterial. *Morrison, ante,* p. 1. Double jeopardy, therefore, does not bar an appeal by the Government.

We grant the motion to proceed *in forma pauperis* and the petition for certiorari, vacate the judgment of the Court of Appeals, and remand to that court for proceedings consistent herewith.

*It is so ordered.*

# UNITED STATES *v.* DIETER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75-1547. Decided October 12, 1976

The 30-day limitation period prescribed by the Criminal Appeals Act and Fed. Rule App. Proc. 4 (b) for a Government appeal from an order dismissing an indictment ran from the date of the District Court's denial of the Government's motion to set aside the dismissal of the indictment against respondent, rather than from the date of the dismissal order, and hence the Government's appeal was timely where its notice of appeal was filed within 30 days after such denial. A timely petition for rehearing renders the original judgment nonfinal for appeal purposes for as long as the petition is pending, *United States* v. *Healy,* 376 U. S. 75, 78-79, and, while not captioned a "petition for rehearing," the Government's motion was precisely that in purpose and effect.

Certiorari granted; vacated and remanded.

PER CURIAM.

The respondent was indicted in early 1973 for violating 21 U. S. C. § 841 (a) after a search at a permanent immigration traffic checkpoint in New Mexico of a vehicle in which he was a passenger had turned up a substantial quantity of marihuana. His motion to suppress the marihuana was initially denied by the District Court. Thereafter, this Court ruled in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), that a warrantless roving patrol search of a vehicle, conducted without probable cause on a road removed from the border, violated the Fourth Amendment. The Court of Appeals for the Tenth Circuit subsequently ruled in *United States* v. *King,* 485 F. 2d 353 (1973), and *United States* v. *Maddox,* 485 F. 2d 361 (1973), that *Almeida-Sanchez* should be applied retroactively.[1] The District Court then reconsidered the respondent's motion to suppress, and on October 4, 1974, dismissed the indictment.

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[1] That view was later repudiated by this Court in *United States* v. *Peltier,* 422 U. S. 531 (1975).

On October 16, 1974, the Government filed a "Motion to Set Aside [the] Order of Dismissal" on the ground that the facts in this case were materially different from those in *Almeida-Sanchez* and that "the Order dismissing the case was entered through inadvertence." On November 6, 1974, the District Court denied the motion on the ground that it had "no authority or jurisdiction" to set aside the order. On November 7, 1974, the Government filed a notice of appeal.

The Court of Appeals dismissed the appeal, holding that it was untimely because the notice of appeal had not been filed until 34 days after entry of the October 4 order and hence fell outside the 30-day limitation period for a Government appeal from an order dismissing an indictment.[2] The appellate court held that the October 4 order was final for purposes of appeal, notwithstanding the Government's October 16 motion to set aside that order. In denying the Government's petition for rehearing and suggestion for rehearing en banc, the court recognized that in *United States* v. *Healy,* 376 U. S. 75 (1964), decided at a time when a Government appeal from an order dismissing an indictment was taken directly to this Court rather than to a court of appeals, we held that the 30-day limitation period runs from the denial of a timely petition in the District Court for rehearing, rather than from the date of the order itself. The Court of Appeals reasoned, however, that *Healy* did not control because the post-dismissal motion there involved "was directed squarely at an alleged error of law committed by the trial court," whereas in this case the Government's motion "to set aside on the grounds of mistake or inadvertence was an entirely different species of pleading . . . ." App. to Pet. for Cert. 4A.

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[2] Title 18 U. S. C. § 3731 provides in pertinent part that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts," and that "[t]he appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered . . . ." Federal Rule App. Proc. 4 (b) provides in pertinent part:

"When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket."

The Court of Appeals misconceived the basis of our decision in *Healy*. We noted there that the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending. 376 U. S., at 78–79.[3] To have held otherwise might have prolonged litigation and unnecessarily burdened this Court, since plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court of a petition for rehearing. *Id.,* at 80. The fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity promptly to correct their own alleged errors, and we must likewise be wary of imposing added and unnecessary burdens on the courts of appeals. These considerations fully apply whether the issue presented on appeal is termed one of fact or of law, and the Court of Appeals' law/fact distinction—assuming such a distinction can be clearly drawn for these purposes—finds no support in *Healy*. It is true that the Government's post-dismissal motion was not captioned a "petition for rehearing," but there can be no doubt that in purpose and effect it was precisely that, asking the District

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[3] The Court of Appeals' concern with the lack of a statute or rule expressly authorizing treatment of a post-dismissal motion as suspending the limitation period ignores our having grounded our decision in *Healy*, not on any express authorization (which was similarly lacking in *Healy*), but rather on "traditional and virtually unquestioned practice." 376 U. S., at 79.

Court to "reconsider [a] question decided in the case" in order to effect an "alteration of the rights adjudicated." *Department of Banking* v. *Pink,* 317 U. S. 264, 266 (1942).

The motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings.

*It is so ordered.*

# UNITED STATES *v.* POMPONIO ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1667. Decided October 12, 1976

At respondents' trial on a charge of willfully filing false income tax returns in violation of § 7206 (1) of the Internal Revenue Code, the District Court adequately instructed the jury on willfulness in accordance with the standard that willfulness in the context of § 7206 and related statutes simply means a voluntary, intentional violation of a known legal duty, *United States* v. *Bishop*, 412 U. S. 346, and hence an additional instruction on good faith was unnecessary.

Certiorari granted; 528 F. 2d 247, reversed and remanded.

PER CURIAM.

After a jury trial, respondents were convicted of willfully filing false income tax returns in violation of 26 U. S. C. § 7206 (1).[1] Based on its reading of *United States* v. *Bishop*, 412 U. S. 346 (1973), the Court of Appeals held that the jury was incorrectly instructed concerning willfulness, and remanded for a new trial. 528 F. 2d 247 (1975). The United States petitioned for certiorari. We reverse.

The respondents were charged with falsifying tax returns in two principal ways: (1) they allegedly caused corporations they controlled to report payments to them as loans, when they knew the payments were really taxable dividends; and (2) they allegedly claimed partnership losses as deductions knowing that the losses were properly attributable to a corporation. Their defense was that these transactions were correctly reported, or at least that they thought so at the time.

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[1] Section 7206 provides in pertinent part:

"Any person who—

"(1) . . . Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .

. . . . .

"shall be guilty of a felony . . . ."

The jury was instructed that respondents were not guilty of violating § 7206 (1) unless they had signed the tax returns knowing them to be false,[2] and had done so willfully. A willful act was defined in the instructions as one done "voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law." Finally, the jury was instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime," and that consequently motive was irrelevant except as it bore on intent. The Court of Appeals held this final instruction improper because "the statute at hand requires a finding of a bad purpose or evil motive." 528 F. 2d, at 249. In so holding, the Court of Appeals incorrectly assumed that the reference to an "evil motive" in *United States* v. *Bishop, supra,* and prior cases meant something more than the specific intent to violate the law described in the trial judge's instruction.

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[2] We agree with the Court of Appeals that the instructions on this point were "full and complete." 528 F. 2d 247, 249–250 (1975). The jury was told that the Government contended that respondents "couldn't claim this [the partnership losses] as a deduction . . . because by so doing they would know that they were filing a false report of their total gross income." Later the jury was instructed that, if they found the loans were incorrectly reported, they must also find that the return was "made willfully and with the specific intent and knowledge at the time they made it that it was in fact a false return." In explaining intent, the trial judge said that "[t]o establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law." The jury was told to "bear in mind the sole charge that you have here, and that is the violation of 7206, the willful making of the false return, and subscribing to it under perjury, knowing it not to be true and [*sic*] to all material respects, and that and that alone."

In *Bishop* we held that the term "willfully" has the same meaning in the misdemeanor and felony sections of the Revenue Code, and that it requires more than a showing of careless disregard for the truth.[3] We did not, however, hold that the term requires proof of any motive other than an intentional violation of a known legal duty. We explained the meaning of willfulness in § 7206 and related statutes:

> "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' [*United States* v.] *Murdock,* 290 U. S. [389,] 398, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' *Spies* [v. *United States*], 317 U. S. [492,] 498, or knowledge that the taxpayer 'should have reported more income than he did.' *Sansone* [v. *United States*], 380 U. S. [343,] 353. See *James* v. *United States,* 366 U. S. 213, 221 (1961); *McCarthy* v. *United States,* 394 U. S. 459, 471 (1969)." 412 U. S., at 360.

Our references to other formulations of the standard did not modify the standard set forth in the first sentence of the quoted paragraph. On the contrary, as the other Courts of Appeals that have considered the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty. *United States* v. *Pohl-*

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[3] The Court of Appeals in *Bishop* held that the evidence under the misdemeanor statute "need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed." 455 F. 2d 612, 615 (CA9 1972). This Court rejected the view that this lesser degree of culpability was required for a violation of the misdemeanor statute, and held on the contrary that "Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." 412 U. S., at 359–360.

*man*, 522 F. 2d 974, 977 (CA8 1975) (en banc), cert. denied, 423 U. S. 1049 (1976); *United States* v. *McCorkle*, 511 F. 2d 482, 484–485 (CA7) (en banc), cert. denied, 423 U. S. 826 (1975); *United States* v. *Greenlee*, 517 F. 2d 899, 904 (CA3), cert. denied, 423 U. S. 985 (1975); *United States* v. *Hawk*, 497 F. 2d 365, 366–369 (CA9), cert. denied, 419 U. S. 838 (1974). The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary.

As an alternative ground for ordering a new trial, the Court of Appeals held that respondents were entitled to instructions exonerating them if they believed that the payments to them were loans and that the losses belonged to the partnership, 528 F. 2d, at 250. Our inspection of the record indicates that such instructions were given and that they were adequate.[4]

The respondents' other allegations of error which the Court of Appeals found it unnecessary to reach should be considered by that court in the first instance.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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[4] The instructions set forth in n. 2, *supra*, by requiring knowledge that the returns falsely reported the transactions, implicitly required knowledge of the true nature of the transactions. In addition, the jury was instructed with respect to the loans that "if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were withdrawing this money that it was not a loan . . . . In other words, you should determine whether they knew that, and as I have told you, that is an essential element." With respect to the partnership losses, the jury was told that the Government claimed that respondents "knew that they couldn't transfer [a certain asset] to a partnership, and, therefore, when they couldn't transfer it they couldn't take the benefits of any losses sustained by the partnership in question . . . ."

# UNITED STATES *v.* SANFORD ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-1867. Decided October 12, 1976

Where the District Court, because of a hung jury, declared a mistrial on the indictment against respondents, the Double Jeopardy Clause of the Fifth Amendment does not bar a retrial, and hence the Government is entitled under the Criminal Appeals Act to appeal from the District Court's subsequent dismissal of the indictment on respondents' motion, since the dismissal was prior to a trial that the Government had a right to prosecute and the respondents were required to defend. *Serfass* v. *United States*, 420 U. S. 377.

Certiorari granted; 536 F. 2d 871, reversed and remanded.

PER CURIAM.

Respondents were indicted for illegal game hunting in Yellowstone National Park. A jury trial in the United States District Court for the District of Montana resulted in a hung jury, and the District Court declared a mistrial. Four months later, while the Government was preparing to retry them, respondents moved to dismiss the indictment. The District Court, agreeing that the Government had consented to the activities which formed the basis of the indictment, dismissed it. The Government's appeal pursuant to the Criminal Appeals Act, 18 U. S. C. § 3731,[1] was dismissed by the Court of Appeals because that court thought retrial was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The Government petitioned for certiorari, and we vacated the judgment of the Court of

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[1] The Criminal Appeals Act provides in pertinent part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Appeals and remanded for further consideration in the light of our intervening decision in *Serfass* v. *United States,* 420 U. S. 377 (1975). 421 U. S. 996 (1975).

On remand, the Court of Appeals, considering the trilogy of *Serfass, supra, United States* v. *Wilson,* 420 U. S. 332 (1975), and *United States* v. *Jenkins,* 420 U. S. 358 (1975), adhered to its prior determination. The Government now seeks certiorari from that ruling.

The reasoning of the Court of Appeals is best summarized by this language from its opinion:

> "Here appellees have undergone trial. There is no question but that jeopardy has attached. That being so, and since the proceedings in the district court have ended in appellees' favor and the consequences of a reversal in favor of the Government would be that appellees must be tried again, we conclude that they would, on retrial, be placed twice in jeopardy." 536 F. 2d 871, 872 (CA9 1976).

We agree with the Court of Appeals that jeopardy attached at the time of the empaneling of the jury for the first trial of respondents. But we do not agree with that court's conclusion that by reason of the sequence of events in the District Court the Government would be barred by the Double Jeopardy Clause from retrying respondents. The trial of respondents on the indictment terminated, not in their favor, but in a mistrial declared, *sua sponte,* by the District Court. Where the trial is terminated in this manner, the classical test for determining whether the defendants may be retried without violating the Double Jeopardy Clause is stated in Mr. Justice Story's opinion for this Court in *United States* v. *Perez,* 9 Wheat. 579, 580 (1824):

> "We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature,

> the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

The Government's right to retry the defendant, after a mistrial, in the face of his claim of double jeopardy is generally[2] governed by the test laid down in *Perez, supra.* The situation of a hung jury presented here is precisely the situation that was presented in *Perez, supra,* and therefore the Double Jeopardy Clause does not bar retrial of these respondents on the indictment which had been returned against them.

The District Court's dismissal of the indictment occurred several months after the first trial had ended in a mistrial, but before the retrial of respondents had begun. This case is, therefore, governed by *United States* v. *Serfass, supra,* in which we held that a pretrial order of the District Court dismissing an indictment charging refusal to submit to induction into the Armed Forces was appealable under 18 U. S. C. § 3731. The dismissal in this case, like that in *Serfass,* was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend. Since in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy, an appeal from the dismissal is authorized by 18 U. S. C. § 3731.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissent from summary reversal. They would set the case for oral argument.

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[2] If the mistrial is declared at the behest of the defendant, the manifest necessity test does not apply. See *United States* v. *Dinitz,* 424 U. S. 600 (1976).

# STANDARD OIL CO. OF CALIFORNIA *v.* UNITED STATES

### ON MOTION TO RECALL MANDATE

No. 72-1251. Decided October 18, 1976

On motion to recall Supreme Court mandate affirming a District Court judgment against movant, and for leave to file a motion under Fed. Rule Civ. Proc. 60 (b), the motion to recall is denied because the District Court may take appropriate action on the Rule 60 (b) motion without leave of this Court.

PER CURIAM.

Following an eight-day trial, the United States District Court for the Northern District of California enjoined movant from engaging in certain practices found to violate § 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 3. 362 F. Supp. 1331 (1973). The judgment was summarily affirmed by this Court. 412 U. S. 924. Movant now seeks to have the judgment set aside on the basis of alleged misconduct by Government counsel and by a material witness who is now prosecuting a treble-damages action against movant. Preliminarily to filing a motion in the District Court pursuant to Fed. Rule Civ. Proc. 60 (b), movant has filed a motion in this Court requesting that we recall our mandate[1] and grant leave to proceed in the District Court. We hold that the District Court may entertain a Rule 60 (b) motion without leave by this Court. We therefore deny the motion to recall our mandate, without prejudice to Standard Oil's right to proceed in the District Court.

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[1] It is technically incorrect to refer to our "mandate" because a copy of the judgment was issued in lieu of a mandate. See this Court's Rule 59 (3). Nevertheless, to avoid confusion with the District Court judgment, we will use the term "mandate" throughout this opinion.

We recognize that in the past both this Court and many Courts of Appeals have required appellate leave before the District Court could reopen a case which had been reviewed on appeal.[2] The requirement derived from a belief that an appellate court's mandate bars the trial court from later disturbing the judgment entered in accordance with the mandate. See *In re Potts,* 166 U. S. 263 (1897); *Butcher & Sherrerd* v. *Welsh,* 206 F. 2d 259, 262 (CA3 1953), cert. denied, 346 U. S. 925 (1954); *Home Indemnity Co. of New York* v. *O'Brien,* 112 F. 2d 387, 388 (CA6 1940). It has also been argued that the appellate-leave requirement protects the finality of the judgment and allows the appellate court to screen out frivolous Rule 60 (b) motions. *Tribble* v. *Bruin,* 279 F. 2d 424, 427–428 (CA4 1960); 7 J. Moore, Federal Practice ¶ 60.30 [2], p. 429 n. 27 (1975).

In our view, the arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2873, pp. 269–270 (1973). Cf. *SEC* v. *Advance Growth Capital*

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[2] This Court held that appellate leave was required in *In re Potts,* 166 U. S. 263 (1897), and spoke approvingly of the practice in *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238, 248 (1944). The appellate-leave requirement has also been approved by several Court of Appeals decisions, in addition to those cited in the paragraph of the text accompanying this footnote. See *Wilson Research Corp.* v. *Piolite Plastics Corp.,* 336 F. 2d 303, 305 (CA1 1964); *Hartman* v. *Lauchli,* 304 F. 2d 431, 432–433 (CA8 1962) (alternative holding). On the other hand, the Tenth Circuit has rejected the requirement, *Kodekey Electronics, Inc.* v. *Mechanex Corp.,* 500 F. 2d 110, 112–113 (1974); *Wilkin* v. *Sunbeam Corp.,* 405 F. 2d 165 (1968), and the Seventh Circuit has recently indicated that it now "would probably not go so far as to hold that appellate leave is necessary whenever relief is sought under Rule 60 (b)(5)," *SEC* v. *Advance Growth Capital Corp.,* 539 F. 2d 649, 650 (1976).

*Corp.*, 539 F. 2d 649, 650 (CA7 1976). Furthermore, the interest in finality is no more impaired in this situation than in any Rule 60 (b) proceeding. Finally, we have confidence in the ability of the district courts to recognize frivolous Rule 60 (b) motions. Indeed, the trial court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60 (b)," *Wilkin* v. *Sunbeam Corp.*, 405 F. 2d 165, 166 (CA10 1968). Accord, *Wilson Research Corp.* v. *Piolite Plastics Corp.*, 336 F. 2d 303, 305 (CA1 1964); 11 Wright & Miller, *supra*, at 269.

The appellate-leave requirement adds to the delay and expense of litigation and also burdens the increasingly scarce time of the federal appellate courts. We see no reason to continue the existence of this "unnecessary and undesirable clog on the proceedings," *S. C. Johnson & Son, Inc.* v. *Johnson*, 175 F. 2d 176, 184 (CA2 1949) (Clark, J., dissenting). We therefore deny the motion to recall because the District Court may take appropriate action without this Court's leave.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

# MOORE *v.* UNITED STATES

### ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1692. Decided October 18, 1976

It was error for the trial judge in a bench trial to rely upon wrongfully admitted hearsay evidence in finding petitioner guilty of a federal narcotics offense, but where the judge did not find petitioner guilty on this evidence alone, the case is remanded to the Court of Appeals to determine whether the wrongful admission of the hearsay evidence was harmless error, and if not, whether petitioner waived objection to it.

Certiorari granted; vacated and remanded.

PER CURIAM.

John David Moore, Jr., was convicted in a bench trial of possession of heroin with intent to distribute it, in violation of 21 U. S. C. § 841 (a)(1). In an unpublished order, the Court of Appeals summarily affirmed the judgment of conviction.

In early January 1975, police officers received a tip from an informant that Moore and others were in possession of heroin at "Moore's apartment." The police obtained a search warrant and entered the apartment, where they found Moore lying face down near a coffee table in the living room. Also present in the apartment was a woman who was sitting on a couch in the same room. Bags containing heroin were found both on top of and beneath the coffee table, and they were seized along with various narcotics paraphernalia.

At a consolidated hearing on Moore's motion to suppress evidence and on the merits, the prosecution adduced no admissible evidence showing that Moore was in possession of the heroin in the apartment in which he and the woman were found other than his proximity to the narcotics at the time the warrant was executed. Indeed, one police officer testified that he did not find "any indications of ownership of the apartment." In his closing argument on the merits, however, the prosecutor placed substantial emphasis on the out-of-court declaration of the unidentified informant:

> "[A] confidential informant came to Detective Uribe and said, 'I have information or I have—through personal observation, know that John David Moore resides at a certain apartment here in El Paso, Texas, and he is in possession of a certain amount of heroin.' "

In adjudging Moore guilty, the trial court found that he had been in close proximity to the seized heroin, that he was the tenant of the apartment in question, and that he had, therefore, been in possession of the contraband. In making these findings, the court *expressly* relied on the hearsay declaration of the informant:

> "Information revealed by the confidential informant and relied upon in the preparation of the Affidavit disclosed that John David Moore was the occupant of Apartment # 60, Building # 7, Hill Country Apartments, 213 Argonaut, El Paso, Texas."

Defense counsel objected to the court's reliance upon hearsay evidence, but the judge refused to amend this finding except to add the phrase "at the time of the seizure" to the end of the sentence.

There can be no doubt that the informant's out-of-court declaration that the apartment in question was "Moore's apartment," either as related in the search warrant affidavit or as reiterated in live testimony by the police officers, was hearsay and thus inadmissible in evidence on the issue of Moore's guilt. Introduction of this testimony deprived Moore of the opportunity to cross-examine the informant as to exactly what he meant by "Moore's apartment," and what factual basis, if any, there was for believing that Moore was a tenant or regular resident there. Moore was similarly deprived of the chance to show that the witness' recollection was erroneous or that he was not credible.[1] The informant's declaration falls within no exception to the hearsay rule recognized in the Federal Rules of Evidence, and reliance on this hearsay statement in determining petitioner's guilt or innocence was error.[2]

Although the only competent evidence of Moore's possession of the narcotics was his proximity to them in an apartment in which another person was also present and of which he was not shown to be the tenant or even a regular resident, the Solicitor General now argues that the error in admitting the hearsay evidence was harmless. That is far from clear. Whether or not the evidence of proximity alone, when viewed in the light most favorable to the prosecution, could suffice to prove beyond a reasonable doubt that Moore was in possession of the heroin, the fact is that the trial court did not find Moore guilty on that evidence alone.

The Government suggests that Moore's failure to testify or to adduce any evidence showing "that his presence in the apartment was unrelated to the heroin" highlights the alleged harmlessness of the error, but this suggestion can carry no weight in view of the elementary proposition that the prosecution bore the burden of proving beyond a reasonable doubt every element of the charged offense. Equally unpersuasive is the Government's argument that the error was probably harmless because Moore was convicted in a bench trial; whatever the merits of that argument as a general proposition, it has a hollow ring in a case where the trial judge expressly relied upon the inadmissible evidence in finding the defendant guilty.

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[1] Moore moved to require disclosure of the informant's identity, but the Government opposed the motion and the trial judge denied it.

[2] Although we do not rely on the Government's confession of error, we note that the Solicitor General concedes that admission of the hearsay evidence on the question of Moore's guilt or innocence was improper.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court so it may determine whether the wrongful admission of the hearsay evidence was harmless error.[3]

*It is so ordered.*

THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent from summary reversal and would set the case for oral argument.

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[3] The Government also urges that petitioner's failure to suggest in his closing argument that consideration of the hearsay evidence be restricted to the suppression issue constituted a waiver of any objection to the District Judge's reliance on that evidence in determining guilt or innocence. The Court of Appeals has not passed on this question, and we leave it for resolution by that court on remand.

# IMMIGRATION AND NATURALIZATION SERVICE *v.* BAGAMASBAD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-1666. Decided November 1, 1976

Where respondent alien, upon overstaying her tourist visa, applied to have her status adjusted to that of a permanent resident alien pursuant to 8 U. S. C. § 1255 (a) (which authorizes the Attorney General in his discretion to make such an adjustment if, *inter alia,* the alien would be eligible for an immigrant visa and admissible as a permanent resident), an immigration judge in denying the application in the exercise of his discretion was not required to make advisory findings and conclusions as to respondent's statutory eligibility for admission as a permanent resident.

Certiorari granted; 531 F. 2d 111, reversed.

PER CURIAM.

Repondent, an alien who had overstayed her tourist visa by four years, applied to have her status adjusted to that of permanent resident alien pursuant to 8 U. S. C. § 1255 (a). That section authorizes the Attorney General in his discretion to change the status of an alien who is physically present in the United States to that of a permanent resident, but only if, among other things, the alien would be eligible for an immigrant visa and admissible into the United States as a permanent resident.* The District Director of the Immigration

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*That section provides:

"The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States *may* be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately and Naturalization Service (INS) denied respondent's application as a matter of discretion because she had made serious misrepresentations to the United States consul who had issued her visa. For the same reasons, the immigration judge presiding at a later deportation hearing also declined to exercise his discretion in her favor. Neither the District Director nor the immigration judge addressed himself to whether respondent satisfied the specific statutory requirements for permanent residence. The Board of Immigration Appeals affirmed, finding that the circumstances fully supported the discretionary denial of relief and concluding that "the immigration judge could properly pretermit the question of statutory eligibility and deny the application . . . as an exercise of discretion."

A divided Court of Appeals sitting en banc held that although the immigration judge had properly exercised his discretion to deny respondent's application, the statute required the judge to make findings and reach conclusions with respect to respondent's eligibility for admission into this country as a permanent resident. 531 F. 2d 111 (CA3 1976). Disagreeing as we do with the Court of Appeals, we grant the petition for certiorari filed by the INS and the motion by respondent to proceed *in forma pauperis* and reverse the judgment of the Court of Appeals.

As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach. *Hirabayashi* v. *United States,* 320 U. S. 81, 85 (1943); *Silva* v. *Carter,* 326 F. 2d 315 (CA9 1963),

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available to him at the time his application is approved." (Emphasis added.)

If adjustment of status is denied, and the alien leaves the country, such alien is free to apply to a United States consul in the country to which he or she is deported for an immigrant visa. Title 8 U. S. C. § 1255 (a) was enacted so that such aliens would not inevitably be *required* to leave the country and apply to a United States consul in order to obtain permanent-resident status.

cert. denied, 377 U. S. 917 (1964); *Goon Wing Wah* v. *INS*, 386 F. 2d 292 (CA1 1967); *De Lucia* v. *INS*, 370 F. 2d 305, 308 (CA7 1966), cert. denied, 386 U. S. 912 (1967). Here, it is conceded that respondent's application would have been properly denied whether or not she satisfied the statutory eligibility requirements. In these circumstances, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility.

In arriving at its contrary conclusion, the Court of Appeals relied on a dictum in *Jay* v. *Boyd*, 351 U. S. 345 (1956), which involved a similar provision, 8 U. S. C. § 1254 (a), authorizing the Attorney General in his discretion to grant relief from deportation if certain eligibility requirements are met. In the course of affirming the discretionary denial of relief, the Court indicated that the statute entitled the applicant to a ruling on his eligibility. But the statement followed a reference to immigration regulations which then expressly required a determination of eligibility in each case. 351 U. S., at 352–353. These regulations have been superseded, and the regulation applicable to this case has no such requirement. 8 CFR § 242.18 (a) (1976).

The Court of Appeals also thought it advisable to require the making of eligibility findings in 8 U. S. C. § 1255 (a) proceedings to foreclose the possibility that a United States consul to whom an alien might later apply for an immigration visa would mistakenly construe the immigration judge's exercise of discretion as a finding of statutory ineligibility binding on the consul. But the basis for the immigration judge's action must be set forth in writing under 8 CFR § 242.18 (a) (1976). Where, as here, his action is discretionary, it will be clear to any United States consul that no eligibility determination has been made. The consul will be free to give such findings as have been made their appropriate weight, if any, see *Cartier* v. *Secretary of State,* 165 U. S. App. D. C. 130, 137, 506 F. 2d 191, 198 (1974), cert. denied, 421 U. S. 947 (1975); *Talavera* v. *Pederson,* 334 F. 2d 52, 57 (CA6 1964), and to make his own legal judgment on eligibility.

The judgment of the Court of Appeals is reversed.

*So ordered.*

# HUTTO, ARKANSAS DEPARTMENT OF CORRECTION COMMISSIONER *v.* ROSS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1726. Decided November 1, 1976

Respondent's confession to a crime was not *per se* inadmissible at his criminal trial as being involuntary merely because it was made as a result of an agreed-upon but unexecuted plea bargain that did not call for such a confession. Where the confession does not appear to have been the result of " 'any direct or implied promises' " or any coercion on the prosecution's part, it was not involuntary.

Certiorari granted; 531 F. 2d 924, reversed and remanded.

PER CURIAM.

In March 1972, in Johnson County, Ark., respondent was charged by information with the crime of embezzlement. With the assistance of counsel, respondent entered into plea negotiations with the prosecuting attorney, and the parties reached an agreement that respondent would enter a plea of guilty on the understanding that the prosecutor would recommend a 15-year prison sentence, with 10 years suspended. Approximately two weeks later, the prosecuting attorney asked respondent's counsel whether respondent would be willing to make a statement concerning the crimes.[1] Although counsel advised respondent of his Fifth Amendment privilege and informed him that the terms of the negotiated plea bargain were available regardless of his willingness to comply with the prosecuting attorney's request, the respondent agreed to make a statement confessing to the crime charged. The record discloses that the statement was made under oath in the office of respondent's counsel, with counsel present, and after respondent had been advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966).[2]

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[1] Counsel for respondent testified at the federal habeas corpus hearing that the prosecuting attorney asked for the statement in order to complete his file "as to actually what occurred and how [respondent] took the money and used it." 1 Record 37.

Respondent subsequently withdrew from the plea bargain, retained new counsel, and demanded a jury trial. The trial court ruled, after hearing evidence outside the presence of the jury, that respondent had confessed voluntarily. The statement was admitted at trial, and respondent was convicted and sentenced to 21 years' imprisonment. On appeal, the Arkansas Supreme Court affirmed. *Ross* v. *State*, 257 Ark. 44, 514 S. W. 2d 409 (1974). This Court denied certiorari. 421 U. S. 931 (1975).

Respondent then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Arkansas challenging the state court's finding of voluntariness. 28 U. S. C. § 2254. The District Court held an evidentiary hearing, and on May 23, 1975, denied the petition, agreeing with the state court that the confession was voluntary and therefore admissible. *Mobley ex rel. Ross* v. *Meek*, 394 F. Supp. 1219 (1975).

The Court of Appeals for the Eighth Circuit reversed, finding the statement inadmissible because "it . . . was made in connection with an offer to plead guilty and after a [plea] bargain had been agreed upon." 531 F. 2d 924, 926 (1976). It made no difference, in the court's view, that the confession was not an express precondition of the plea bargain; the confession became "part and parcel" of the plea bargain because "[the] confession would [not] have been made at the request of the prosecution *but for* the plea bargain." *Ibid.* (emphasis added). Since the plea bargain had not been executed, the court found the confession involuntary and therefore inadmissible.

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[2] In response to questions asked by the prosecuting attorney at this meeting, respondent said that his confession was voluntary and that he had not been promised anything in return for making the confession. *Mobley ex rel. Ross* v. *Meek*, 394 F. Supp. 1219, 1221–1222 (WD Ark. 1975).

The only question in this case is whether a confession is *per se* inadmissible in a criminal trial because it was made subsequent to an agreed upon plea bargain that did not call for such a confession.[3] We conclude that the Court of Appeals erred when it held that *any* statement made as a result of a plea bargain is inadmissible.

The Court of Appeals reasoned that respondent's confession was involuntary because it was made "as a result of the plea bargain" and would not have been made "but for the plea bargain." *Id.*, at 927, 926. But causation in that sense has never been the test of voluntariness. See *Brady* v. *United States*, 397 U. S. 742, 749–750 (1970). The test is whether the confession was " 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.' " *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897); see *Brady* v. *United States*, *supra*, at 753. The existence of the bargain may well have entered into respondent's decision to give a statement, but counsel made it clear to respondent that he could enforce the terms of the plea bargain whether or not he confessed. The confession thus does not appear to have been the result of " 'any direct or implied promises' " or any coercion on the part of the prosecution, and was not involuntary. *Bram* v. *United States*, *supra*, at 542–543.

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[3] This case does not involve the admissibility at trial of a guilty plea subsequently withdrawn by leave of court. That issue was settled in *Kercheval* v. *United States*, 274 U. S. 220 (1927), which held that such pleas could not be used as evidence of guilt at a subsequent trial. Nor does this case involve the admissibility in criminal trials of statements made during the plea negotiation process. See Fed. Rule Crim. Proc. 11 (e)(6); *Moulder* v. *State*, 154 Ind. App. 248, 289 N. E. 2d 522 (1972); ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.4 (Approved Draft of 1968).

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

MR. JUSTICE STEWART dissents. Agreeing with the reasoning of the Court of Appeals, he would affirm its judgment.

*It is so ordered.*

# UNITED STATES v. FOSTER LUMBER CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-799. Argued November 12, 1975—Reargued October 5, 1976—Decided November 2, 1976

Section 172 of the Internal Revenue Code of 1954, as amended, provides that a "net operating loss" experienced by a corporate taxpayer in one year may be carried as a deduction to the preceding three years and the succeeding five years to offset taxable income of those years. The entire loss must be carried back to the earliest possible year and any of the loss not "absorbed" by that first year may then be carried to succeeding years, since "[t]he portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried." § 172 (b)(2). Proceeding under that provision respondent taxpayer carried back a net operating loss of some $42,000, which it had sustained in 1968, to 1966, in which year respondent had ordinary income of about $7,000 and a capital gain of about $167,000. After applying the "alternative tax" method of § 1201 (a), which permits low capital gains taxation, respondent maintained that after subtracting the $42,000 loss deduction from the 1966 ordinary income, the negative balance of about $35,000 was still available to offset income for 1967, respondent taking the position that its 1968 loss had been "absorbed" in 1966 only to the extent of the $7,000 ordinary income. Respondent accordingly made a refund claim for the taxable year 1967, which the Commissioner disallowed but which the District Court upheld. The Court of Appeals affirmed. *Held:* In carrying back a net operating loss under § 172 to a year in which the taxpayer had both ordinary income and capital gains and employed the alternative tax computation method of § 1201 (a), the loss deduction available for carryover to a succeeding year is the amount by which the loss exceeds the taxpayer's "taxable income"—ordinary income plus capital gains for the prior year—the loss carryover being "absorbed" by capital gains as well as ordinary income. Pp. 36-48.

(a) Absent any specific provision in the Code excluding capital gains from "taxable income," the Code's definitions of "taxable income" and gross income in §§ 63 (a) and 61 (a) require that both capital gain and ordinary income must be included in the taxable income that § 172 directs must be offset by the loss deduction before any loss excess can be found available for transfer forward to the succeeding taxable year, and if Congress had intended to permit a loss deduction to offset only ordinary income when § 1201 (a) is used, it could easily have said so. Pp. 36–41.

(b) The legislative history of the loss offset provisions does not support respondent's contention that they were designed to eliminate all consequences of the timing of the loss. Pp. 42–46.

(c) Had Congress intended substantially to eliminate timing accidents from the calculation of income on an average basis it would not have tolerated the departure from that purpose in § 172 (c), under which a taxpayer cannot have a loss for a particular year unless its deductions exceed its ordinary income and its capital gains. Pp. 46–47.

500 F. 2d 1230, reversed.

STEWART, J., delivered the opinion of the Court, in which WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 48. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and POWELL, JJ., joined, *post*, p. 49.

*Stuart A. Smith* reargued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Crampton, Jonathan S. Cohen,* and *Ernest J. Brown.*

*Russell W. Baker* reargued the cause for respondent. With him on the brief was *Paul R. Lamoree.**

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 172 of the Internal Revenue Code of 1954, as amended, provides that a "net operating loss" experienced by a corporate taxpayer in one year may be carried as a deduction to the preceding three years and the succeeding five years to offset taxable income of those years.[1] The entire loss must be carried to the earliest possible year; any of the loss that is not "absorbed" by that first year may then be carried in turn to succeeding years. The respondent, Foster Lumber Co., sustained a net operating loss of some $42,000 in 1968, which it carried back to 1966. In 1966 the respondent had had ordinary income of about $7,000 and a capital gain of about $167,000. The question presented is whether a loss carryover is "absorbed" by capital gain as well as ordinary income or is instead limited to offsetting only ordinary income. The taxpayer filed a refund suit in Federal District Court challenging the Commissioner's

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*Briefs of *amici curiae* urging affirmance were filed by *Hilbert P. Zarky* for Data Products Corp.; and by *Edward J. Schmuck, Jerome B. Libin,* and *George R. Abramowitz* for North River Insurance Co.

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[1] Title 26 U. S. C. § 172 (1964 ed.): "Net operating loss deduction.

"(a) *Deduction allowed.*

"There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term 'net operating loss deduction' means the deduction allowed by this subsection.

"(b) [as amended by § 317 (b), Trade Expansion Act of 1962, Pub. L. 87-794, 76 Stat. 889, and §§ 210 (a) and 210 (b), Revenue Act of 1964, Pub. L. 88-272, 78 Stat. 47, 48] *Net operating loss carrybacks and carryovers.*

"(1) *Years to which loss may be carried.*

"(A)(i) Except as provided in clause (ii) and in subparagraph (D), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

"(ii) In the case of a taxpayer with respect to a taxable year ending on or after December 31, 1962, for which a certification has been issued under section 317 of the Trade Expansion Act of 1962, a net operating loss for such taxable year shall be a net operating loss carryback to each of the 5 taxable years preceding the taxable year of such loss.

"(B) Except as provided in subparagraphs (C) and (D), a net operating loss for any taxable year ending after December 31, 1955, shall be a net operating loss carryover to each of the 5 taxable years following the taxable year of such loss.

. . . . .

"(2) *Amount of carrybacks and carryovers.*

"Except as provided in subsections (i) and (j), the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the 'loss year') shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. For purposes of the preceding sentence, the taxable income for any such prior taxable year shall be computed—

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"(A) with the modifications specified in subsection (d) other than paragraphs (1), (4), and (6) thereof; and

"(B) by determining the amount of the net operating loss deduction—

"(i) without regard to the net operating loss for the loss year or for any taxable year thereafter, and

"(ii) without regard to that portion, if any, of a net operating loss for a taxable year attributable to a foreign expropriation loss, if such portion may not, under paragraph (1)(D), be carried back to such prior taxable year,

"and the taxable income so computed shall not be considered to be less than zero. For purposes of this paragraph, if a portion of the net operating loss for the loss year is attributable to a foreign expropriation loss to which paragraph (1)(D) applies, such portion shall be considered to be a separate net operating loss for such year to be applied after the other portion of such net operating loss.

. . . . .

"(c) *Net operating loss defined.*

"For purposes of this section, the term 'net operating loss' means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

"(d) *Modifications.*

"The modifications referred to in this section are as follows:

"(1) *Net operating loss deduction.*

"No net operating loss deduction shall be allowed.

"(2) *Capital gains and losses of taxpayers other than corporations.*

"In the case of a taxpayer other than a corporation—

. . . . .

"(B) the deduction for long-term capital gains provided by section 1202 shall not be allowed."

disallowance of its claim that the $35,000 of the 1968 loss not used to offset its 1966 ordinary income survived to reduce its 1967 tax liability. The trial court and the Court of Appeals for the Eighth Circuit agreed with the taxpayer. We granted certiorari to resolve a Circuit conflict on a recurring question of statutory interpretation.[2]

## I

The dispute in this case centers on the meaning of "taxable income" as used in § 172 (b)(2) to govern the amount of carrybacks and carryovers that can be successively transferred from one taxable year to another. In relevant part, § 172 (b)(2) requires the net operating loss to be carried in full to the earliest taxable year possible, and provides: "The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried." Thus when the loss has been carried back to the first year to which it is applicable, the loss "survives" for carryover to a succeeding taxable year only to the extent that it exceeds the taxable income of the earlier year. "Taxable income" is defined in § 63 (a) of the Code to mean "gross income, minus the deductions allowed by this chapter." Gross income is in turn defined by § 61 (a) of the Code as "all income from whatever source derived," and specifically includes "[g]ains derived from dealings in property." On its face the concept of "taxable income" thus includes capital gains as well as ordinary income. In the absence of a specific provision excluding capital gains,[3] it thus appears that both capital gain and ordinary income must be included in the taxable income that § 172 directs must be offset by the loss deduction before any loss excess can be found to be available for transfer forward to the succeeding taxable year.

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[2] 420 U. S. 1003. In the present case the Court of Appeals for the Eighth Circuit followed the seminal Tax Court decision in *Chartier Real Estate Co.* v. *Commissioner*, 52 T. C. 346, aff'd *per curiam*, 428 F. 2d 474 (CA1). See 500 F. 2d 1230. The Ninth Circuit is in agreement with the First and the Eighth Circuits. See *Olympic Foundry Co.* v. *United States*, 493 F. 2d 1247, and *Data Products Corp.* v. *United States*, No. 74-3341 (Dec. 27, 1974), cert. pending, No. 74-996. The Fourth Circuit refused to follow the reasoning of those Circuits in *Mutual Assurance Soc.* v. *Commissioner*, 505 F. 2d 128. The Sixth Circuit appears to agree in principle with the Fourth Circuit's reasoning. See *Axelrod* v. *Commissioner*, 507 F. 2d 884.

The respondent argues that the Code's prescribed method for calculating the taxes due on its taxable income conflicts with this natural reading of § 172. The Code provides two methods for computing taxes due on corporate income, and a corporation is under a statutory duty to employ the method that results in the lower tax. 26 U. S. C. § 1201 (a). Under § 11, the "regular method," ordinary income and capital gains income are added together to produce taxable income; during the period at issue a 22% tax rate was then imposed on the first $25,000 of taxable income and the remainder was taxed at a 48% rate. Section 1201 (a) of the Code prescribes the "alternative tax," calculated in two steps and applied when resulting in a lower tax liability for the corporation. The first step computes a partial tax on the taxable income reduced by the net long-term capital gain[4] at the regular corporate rates imposed by § 11. This step effectively subjects only ordinary income to the partial tax. The second step imposes a 25% tax on the net long-term capital gain. The alternative tax is the sum of the partial tax and the tax on capital gain. In practical terms, the alternative tax does not redefine taxable income, but it does result in a much lower effective tax rate for corporations whose income is in whole or substantial part composed of capital gain. It thus extends to corporations the longstanding statutory policy of taxing income from capital gain at a lower rate than that applicable to ordinary income.

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[3] Congress has specifically tailored definitions of taxable income in other sections of the Code when the § 63 (a) definition is inadequate for its purposes. See, *e. g.*, 26 U. S. C. § 593 (b) (2) (E) (mutual savings banks); § 832 (a) (insurance companies); § 852 (b) (2) (regulated investment companies). Congress in fact did state certain modifications of the term "taxable income" in the third sentence of § 172 (b) (2), but none of these modifications suggests any instances in which taxable income does not include capital gains.

[4] For purposes of simplicity we use the term "net long-term capital gain" or simply "capital gain" rather than the statutory phrase "excess of

The problem from the respondent's point of view is that the mechanics of the alternative tax work in such a way that the potential benefit of the loss deduction may not be fully reflected in reduced tax liability for the taxable year to which the loss is carried. The problem arises when, as in 1966 for the respondent, the "alternative method" governs the calculation of tax liability, and the ordinary income effectively subject to the partial tax under the first step is less than the loss deduction subtracted from it. The Code does not permit the excess loss to be subtracted from the capital gain income before the second step is carried out.[5] Under the alternative method, therefore, the tax benefit of the loss deduction is effectively lost for the carryover year to the extent that it exceeds the ordinary income in that year. This can be seen simply by considering the taxpayer's circumstances in this case. Subtracting the loss deduction of $42,203.12 from the 1966 ordinary income of

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net long-term capital gain over net short-term capital loss." Similarly, we sometimes in this opinion use the term "loss deduction" rather than the statutory phrase "net operating loss deduction."

[5] See 26 U. S. C. § 1201 (a)(2) and *Chartier Real Estate Co.*, 52 T. C., at 350-356; *Weil* v. *Commissioner*, 23 T. C. 424, aff'd, 229 F. 2d 593 (CA6).

$7,236.05 under Step 1[6] resulted in a negative balance of $34,967.07; no partial tax was imposed and the 25% rate on the $166,634.81 of capital gains under Step 2 produced a tax of $41,658.70. If the loss deduction had been merely $7,236.05, and thus exactly offset the $7,236.05 of ordinary income, however, the tax due would still have been $41,658.70. The taxpayer therefore asserts that only $7,236.05 of the loss deduction was actually "used" in 1966 and that $34,967.07 remained to be carried forward to reduce its tax liability in 1967.

There can be no doubt that if the "regular method" had been applicable to the respondent's taxes in 1966, the loss deduction ($42,203.12) would have been fully "used" to offset capital gains ($166,634.81) as well as ordinary income

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[6] The description in the text of the alternative tax computation method is truncated; the mechanics are here set out in full:

*"Alternative Method" (Section 1201 (a))*

| | | |
|---|---|---|
| Taxable Income (excluding net operating loss deduction): | | |
| Ordinary Income | $7,236.05 | |
| Capital Gain Income | 166,634.81 | |
| | | $173,870.86 |
| LESS: Net Operating Loss Deduction Resulting From Carryback of 1968 Net Operating Loss | | (42,203.12) |
| Taxable Income (Section 63 (a)) | | $131,667.74 |
| *(Step 1—Partial Tax)* | | |
| LESS: Excess of Net Long-Term Capital Gain Over Net Short-Term Capital Loss | | $166,634.81 |
| Balance | | ($ 34,967.07) |
| Partial Tax at Section 11 Rates on Balance (Section 1201 (a)(1)) | | -0- |
| *(Step 2—Capital Gain Tax)* | | |
| PLUS: Capital Gain Tax at Flat 25 Percent Rate on Excess of Net Long-Term Capital Gain Over Net Short-Term Capital Loss (Section 1201 (a)(2)) | | $ 41,658.70 |
| Alternative Tax (Sum of Partial Tax and Capital Gain Tax) (1966 rates) | | $ 41,658.70 |

($7,236.05), leaving $131,667.74 to be taxed, and a tax bill of $58,200.52.[7] It is clear that the alternative tax produced the lower tax liability despite the inability to fully "use" the loss deduction; the lower tax resulted directly from the favorable rate of taxation of capital gain income prescribed by the alternative method. The question is whether the two "tax benefit" provisions relied on by the respondent—low capital gain taxation under the alternative method and the loss carryback provision—must each be maximized independently of the other or whether Congress instead anticipated that the benefit provided by the loss deduction might on occasion be subsumed in the greater benefit provided by the alternative tax computation method.

Section 172 does not explicitly address the question of fit between these two tax benefits, providing simply that "[t]he portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried." The respondent contends, and the Tax Court in *Chartier Real Estate Co.* v. *Commissioner*, 52 T. C. 346, aff'd *per curiam*, 428 F. 2d 474 (CA1), held, that the phrase

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[7] The steps taken by the Internal Revenue Service to reach that result are as follows:

*"Regular Method" (Section 11)*

| | | |
|---|---|---|
| Taxable Income (excluding net operating loss deduction): | | |
| Ordinary Income | $7,236.05 | |
| Capital Gain Income | 166,634.81 | |
| | | $173,870.86 |
| LESS: Net Operating Loss Deduction Resulting From Carryback of 1968 Net Operating Loss | | (42,203.12) |
| Taxable Income (Section 63 (a)) | | $131,667.74 |
| Regular Tax (1966 rates) | | $ 58,200.52 |

(The regular tax reflects a $1,500 tax on multiple surtax exemption not at issue in this case.)

"to which such loss may be carried" modifies "taxable income" as well as "each of the prior taxable years." The Tax Court in the *Chartier* case further held that "'taxable income' in this context (as modified by the above phrase) means that taxable income to which the loss is actually applied in computing actual tax liability." 52 T. C., at 357–358. In other words, it was held, taxable income refers only to that ordinary income offset by a loss deduction that produces an additional reduction in tax liability under the alternative tax computation method.

It is, of course, not unusual in statutory construction to find that a defined term's meaning is substantially modified by an attached clause. But reading "taxable income to which . . . such loss may be carried" as equivalent to "taxable income to which such loss may be carried and deducted, resulting in a reduction of tax liability" gives these phrases a synergistic effect that goes well beyond their natural import. Such a construction subtly redefines "taxable income" in terms of the tax impact of a particular method of tax calculation. It thus implicitly departs from the "term of art" definition of taxable income given in § 63 (a), while discovering a significance in the word "carry" that goes well beyond its usual connotation of a transfer of a loss from the year in which it occurred. Standing alone, this strained reading of the statute's terms falls considerably short of the explicit statutory support the Court has previously required of taxpayers seeking a tax benefit from losses suffered in other years. See, *e. g., Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 326.[8] If Congress had intended to allow a loss deduction to offset only ordinary income when the alternative tax calculation method is used, it could easily have said so.

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[8] The construction urged by the respondent also finds no support in the Treasury Regulations on Income Tax that implement § 172. See 26 CFR §§ 1.172–4, 1.172–5 (1976).

## II

The respondent further asserts that the legislative history and the broad policy behind the loss deduction section of the Code support its interpretation of "taxable income" under § 172 (b). Although, for the reasons stated above, it can hardly be said that the benefit claimed by the respondent is fairly within the statutory language, it is not inappropriate to consider this contention—to consider, in short, whether "the construction sought is in harmony with the statute as an organic whole." See *Lewyt Corp.* v. *Commissioner,* 349 U. S. 237, 240.

The respondent relies on the Court's opinion in *Libson Shops, Inc.* v. *Koehler,* 353 U. S. 382, 386, for a description of the legislative purpose in allowing loss carryovers. In that case the Court said that the net operating loss carryover and carryback provisions "were enacted to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year."

There were, in fact, several policy considerations behind the decision to allow averaging of income over a number of years. Ameliorating the timing consequences of the annual accounting period makes it possible for shareholders in companies with fluctuating as opposed to stable incomes to receive more nearly equal tax treatment. Without loss offsets, a firm experiencing losses in some periods would not be able to deduct all the expenses of earning income. The consequence would be a tax on capital, borne by shareholders who would pay higher taxes on net income than owners of businesses with stable income.[9] Congress also sought through allowance of loss carryovers to stimulate enterprise and investment, particularly in new businesses or risky ventures where early losses can be carried forward to future more prosperous years.[10]

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[9] See generally United States Treasury Department and Joint Committee on Internal Revenue Taxation, Business Loss Offsets (1947), excerpted in

The respondent focuses on the equalizing purposes of § 172 to argue that the Commissioner's insistence on the absorption of the loss deduction by capital gain income is inconsistent with § 172's primary purpose of avoiding the subjection of similarly situated taxpayers to significantly different treatment solely on the basis of arbitrary timing. This argument is based on the observation that, unless it is accepted, the taxpayer's ability to fully benefit from the loss carryover deduction will turn on whether ordinary income in the first year to which the loss may be carried exceeds or is less than the loss deduction. If the ordinary income exceeds the loss, the taxpayer will get the full benefit of the deduction; if the ordinary income is less than the loss, the shortfall will be absorbed by capital gain income without providing an incremental tax reduction.

Congress may, of course, be lavish or miserly in remedying perceived inequities in the tax structure. While there is no doubt that Congress through the loss carryover provisions did intend to reduce the arbitrariness inherent in a taxing system based on annual accounting, the history of the loss

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B. Bittker & L. Stone, Federal Income Estate and Gift Taxation 859–863 (1972).

[10] See, *e. g.*, H. R. Rep. No. 855, 76th Cong., 1st Sess., 9 (1939):

"New enterprises and the capital-goods industries are especially subject to wide fluctuations in earnings. It is, therefore, believed that the allowance of a net operating business loss carry-over will greatly aid business and stimulate new enterprises."

See also H. R. Rep. No. 1337, 83d Cong., 2d Sess., 27 (1954):

"The longer period for averaging will improve the equity of the tax system as between businesses with fluctuating income and those with comparatively stable incomes, and will be particularly helpful to the riskier types of enterprises which encounter marked variations in profitability."

offset provision does not support the respondent's vision of a Congress seeking perfection in the realization of its objective.[11]

Over the years, Congress has shifted the definition of both the kinds of losses and the kinds of income that may be used in calculating the loss offset, indicating its ability in this area of the Internal Revenue Code as in others to make precise definitions and later to modify them in pursuing its broad policy goals.[12] For example, Congress in 1924 specifically provided that a noncorporate taxpayer could use the excess of a loss deduction over ordinary income to reduce the amount of capital gain subject to tax,[13] thus permitting full "use" of the loss deduction by the taxpayer. The inference can be drawn that Congress was aware of the potential "waste" of the deduction otherwise and acted to prevent it. That provision was in turn left out of the 1939 Code, leading to the contrary inference that Congress was aware of the "waste" of the deduction but decided not to remedy it.

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[11] Since 1918, the carryover period has gradually been lengthened to provide more potential years of positive income against which experienced losses can be offset; a perfect system from a taxpayer's point of view, however, would eschew any time limitations altogether.

[12] Section 204 (b) of the Revenue Act of 1918 was the first provision to permit the excess of expenses over income in one tax year to be deducted in another tax year. A one-year carryover and carryback was allowed. See Act of Feb. 24, 1919, § 204, 40 Stat. 1060. In 1933, the National Industrial Recovery Act abolished all net operating loss carryovers and carrybacks. See Act of June 16, 1933, § 218 (a), 48 Stat. 209. In 1939, a net operating loss carryover provision was reintroduced and provided for a two-year carryover. See Act of June 29, 1939, § 122, 53 Stat. 867. The three-year carryback and five-year carryover permitted since 1958, has recently been amended to allow seven years for carryover and to permit the taxpayer to elect to forgo carrybacks and to instead carry the net operating loss forward seven years. See Tax Reform Act of 1976, § 806 (a), 90 Stat. 1598.

[13] Act of June 2, 1924, c. 234, § 208 (a) (5), 43 Stat. 262.

The 1939 revision of the Code, in fact, tolerated even further "waste" of the loss deduction, providing not only that the loss must be offset against net income (ordinary income and capital gains),[14] but that tax-exempt interest income must also be included in income that the loss was required to offset. This provision had the same arbitrary policy consequences that the respondent decries under the alternative tax computation method applicable here. It required the loss deduction to be "used up" in offsetting tax-exempt income, thus "wasting" a portion of the loss deduction's capacity to reduce overall tax liability. And it made the utility of the loss deduction turn on the accidents of timing. The loss deduction would be "wasted" in offsetting tax-exempt income realized in an early year, while if the tax-exempt income were not realized until a later year the full tax benefit of the loss deduction could have been garnered. Such results cut against any assertion that the loss-deduction provisions have consistently been used completely to minimize arbitrary timing consequences, and indicate that

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[14] Counsel for the respondent relied in oral argument on *Merrill* v. *United States*, 122 Ct. Cl. 566, 105 F. Supp. 379, which excluded capital gain from the term "net income" in interpreting the 1939 Code's § 12 (g) limitation on tax liability, to demonstrate that "net income" under the 1939 Code could for policy reasons be construed to avoid the unnecessary "wasting" of a loss. Such a construction would be in direct conflict with the statute's general definition of "net income"; under § 122 of the 1939 Code governing loss deductions, there was no phrase like "to which such loss may be carried" to give even a colorable statutory-construction basis to its argument that net income does not include capital gain. The *Merrill* case obviously does not control construction of the "net income" term as used in § 122 of the 1939 Code. And it would be anomalous in any case to conclude that Congress meant to exclude capital gain income from offsetting a loss deduction with the purpose of avoiding "wasting" a loss deduction, when Congress simultaneously required "waste" of the loss deduction by providing that it must offset tax-exempt interest and depletion income as well as net income. See Internal Revenue Code of 1939 §§ 122 (d)(1), (2).

Congress has not hesitated in this area to limit taxpayers to the enjoyment of one tax benefit even though it could have made them eligible for two.

The 1954 Internal Revenue Code continued the 1939 Code's definition of ordinary and capital gain income as subject to setoff by the § 172 loss deduction. Although several substantive changes in the loss-deduction section were made and commented on in the legislative reports accompanying the 1954 Code,[15] there was no indication that the addition to § 172 (b) of the phrase "to which such loss may be carried" was meant to signal a willingness to condition the loss deduction's life on its ability to produce full tax benefits for the taxpayer. In view of the predecessor statutes' tolerance of a taxpayer's inability to maximize the tax benefit of a loss deduction, and the complete failure of the Committee Reports in any way to indicate the shift in policy the respondent claims to discern in the 1954 Code revision, the legislative history simply does not support the respondent's contention that the addition in 1954 of the phrase "to which such loss may be carried" was intended to eliminate the requirement that the loss deduction be used to offset capital gain under the alternative tax computation method.

We turn finally to an examination of § 172 (b) in the context of the statute as it exists today. If the statute could be viewed as consistently minimizing the arbitrariness of timing consequences, a construction of § 172 (b) inconsistent with that approach might be suspect. Section 172 as a whole has not, however, been drafted with the singleminded devotion to reducing arbitrary timing consequences that the respondent urges should control the decision in this case.

The most telling example of Congress' failure to remedy all timing accidents that "rob" a taxpayer of the full benefit of the loss deduction can be found in § 172 (c). That provision defines a "net operating loss" as "the excess of the deductions allowed by this chapter over the gross income." A taxpayer does not have a loss for a particular year unless its deductions exceed its ordinary income and its capital gains. When an ordinary income loss is experienced in a year of negligible capital gains it gives rise to a net operating loss that can be carried over to other years. If that same ordinary income loss comes in a year when the net capital gains exceed that loss, there is no net operating loss under the statute to carry to another year. Because the statute also forbids setting off that ordinary loss against the capital gains before the capital gain tax is computed under the alternative method,[16] the loss' potential tax benefit is arbitrarily "lost" to the taxpayer solely as a result of accidents of timing. Congress, of course, can and occasionally has in the past treated loss years differently from carryover years. But if Congress were intent on substantially eliminating accidents of timing from the calculation of income on an average basis, it would hardly have tolerated such a departure from that purpose at the very inception of the tax benefit provided by § 172.

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[15] See H. R. Rep. No. 1337, 83d Cong., 2d Sess., 27 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 31–33 (1954); H. R. Conf. Rep. No. 2543, 83d Cong., 2d Sess., 30 (1954).

The respondent's argument is further undercut by the holding in *Chartier Real Estate Co.*, not challenged here,[17] that the statute forbids using a loss deduction to offset capital gain income in a loss carryover year. If such an offset were permitted, the taxpayer would benefit by a further reduction in its capital gain tax liability already calculated at a preferential rate. The respondent in effect asks this Court to infer from that deliberate denial of the limited tax benefit that would accrue from using the loss to offset preferentially taxed capital gains, that Congress implicitly meant to confer the even greater tax benefit of using the loss to offset ordinary income taxed at the higher regular rates. In a statutory section that part by part manages explicitly to detail loss calculations on one hand and deductions on the other,[18] such a leap in statutory construction must be much more firmly grounded in a consistently articulated and achieved congressional purpose than can be discerned here.

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[16] See *Chartier Real Estate Co.* v. *Commissioner*, 52 T. C. 346.

[17] The *Chartier* holding relied on *Weil* v. *Commissioner*, 23 T. C. 424, a case in which the Tax Court had concluded that the express language of the 1939 Code provided for a flat rate of tax on taxable capital gain, unreduced by a loss deduction, as an alternative to the tax imposed upon such gain when it is included in gross income and taxed in the regular manner. An *amicus curiae* brief filed in the present case urges that this holding be reconsidered on policy grounds should the respondent's argument be rejected, but concedes that the language of § 1201 (a)(2) supports the result reached in *Weil* and applied in *Chartier*.

The respondent's broad argument, in short, boils down to a contention that "harmony with the statute as an organic whole" can be achieved in this area only by reading the Code provision so as to give the greatest possible benefits to all taxpayers. For the reasons we have discussed, that is a contention that cannot be accepted.

The judgment is

*Reversed.*

MR. JUSTICE STEVENS, concurring.

MR. JUSTICE BLACKMUN advances persuasive policy arguments against the Court's reading of § 172. But the same arguments apply equally to the Code's treatment of an operating loss which occurs in the same year as an offsetting capital gain. In paragraph 7 of his opinion MR. JUSTICE BLACKMUN seems to accept the necessity of a "wooden and unimaginative reading" of the statute in the "same year" situation though he rejects such a reading in a case involving different years. Since the statutory language seems rather plain in both situations, I think we have the same duty in both to resist the temptation to attempt any creative rewriting of the Internal Revenue Code. The relevant Code provisions were perfectly clear in 1939 and there is simply no basis for concluding that the 1954 Code was intended to achieve the result favored by MR. JUSTICE BLACKMUN, no matter how sensible such a result would be. Accordingly, as much as I would like to reach the result advocated by the dissent, I find the arguments in the Court's opinion, which I join, unanswerable.

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[18] Section 172 (d) (2) (B) provides a further indication that capital gains are properly included in the taxable income that a loss deduction must offset before being carried to a succeeding carryover year. For a noncorporate taxpayer who normally computes his tax liability by deducting 50% of net long-term capital gains under § 1202 of the Code, § 172 (d) (2) (B) requires that the full amount of ordinary income plus capital gains be offset against the net operating loss. That "taxable income" encompasses capital gain income for individual taxpayers under § 172 strongly suggests that the "taxable income" of corporate taxpayers should be given similar scope.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL join, dissenting.

What is at issue here is whether a corporate taxpayer's fiscal 1966 net operating loss deduction, carried back from 1968, as provided for by § 172 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 172 (a), was, to use the Government's and the Court's term, "absorbed" by the taxpayer's capital gain [1] for 1966, despite the taxpayer's inability to offset the deduction against capital gain.[2]

The Government's position is that the 1968 loss was "completely absorbed"[3] in 1966 and is unavailable for any other "carry" year (here, fiscal 1967) of the taxpayer; the Government thus would deny the taxpayer *any* tax benefit whatsoever for the excess of its 1968 loss over its 1966 net operating income.[4] The Court today agrees. Because I feel the Court's conclusion is at odds with obvious congressional policies, defeats the purposes of both the capital gain and the "carry" provisions, and is the product of a wooden and unimaginative reading of the pertinent Code sections, I dissent. Congress, accordingly, if its policies are to be effectuated, must try once again.

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[1] I use the term "capital gain" to mean the excess of net long-term capital gain over net short-term capital loss.

[2] See *Weil* v. *Commissioner*, 23 T. C. 424 (1954), aff'd, 229 F. 2d 593 (CA6 1956); *Chartier Real Estate Co.* v. *Commissioner*, 52 T. C. 346, 350-356 (1969), aff'd, 428 F. 2d 474 (CA1 1970).

1. There are two separate policies at work here. Each favors the taxpayer; neither favors the Government. The first is the policy behind Congress' separating capital gain from ordinary income and providing the alternative method of tax computation by § 1201 of the Code, 26 U. S. C. § 1201. By placing a ceiling on the tax rate for capital gain, Congress encourages both the investment and the formation of capital that has proved so essential for the Nation's economic development and strength. Chief Judge Mehaffy, in his opinion for the Court of Appeals in the present case, put it this way:

> "The purpose behind the alternative tax in section 1201 is to alter the tax rate to reflect the traditionally unique character of income arising out of the sale of capital assets." 500 F. 2d 1230, 1232 (CA8 1974).

The second policy is that behind the carryback and carryover provisions: to afford the taxpayer relief from the peaks and valleys occasioned by our system of reporting and paying income taxes annually, and to encourage venture capital.

> "Those provisions were enacted to ameliorate the unduly drastic consequences of taxing income strictly on an

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[3] Tr. of Oral Rearg. 8.

[4] The parties agree that the carryback served to erase the taxpayer's small net operating income for fiscal 1966.

> annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year." *Libson Shops, Inc.* v. *Koehler,* 353 U. S. 382, 386 (1957).[5]

See also *Bulova Watch Co.* v. *United States,* 365 U. S. 753, 759 (1961); S. Rep. No. 665, 72d Cong., 1st Sess., 11 (1932); H. R. Rep. No. 855, 76th Cong., 1st Sess., 9 (1939); H. R. Rep. No. 2319, 81st Cong., 2d Sess., 59 (1950).

The Government's—and the Court's—position, however, sets these policies at cross purposes. The alternative method, required under § 1201 when capital gain is sufficient to make it beneficial for the current year, may become a fatal trap if net operating loss happens to be sustained in a subsequent year. This is so because the Government, as it has here, then confronts the taxpayer with the proposition that the carryback loss excess has been "absorbed" even though *no* ordinary income, or income of any kind, has in fact absorbed it. Use of the alternative method thus has the wholly unintended—and undesirable—result of undercutting the ameliorative purpose of the "carry" provisions, and they become meaningless in specific application. What supposedly was given by each provision is now, and to a largely unpredictable extent, taken away. I regret this disregard for avowed congressional policies and for the statutory provisions that effectuated those policies.

2. There is a mathematical and tax illogic and unfairness in the Government's—and the Court's—analysis. Assuming,

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[5] The Court of Appeals, in the present case, also aptly described this policy:

"The basic purpose behind the net operating loss carry back provisions of section 172 is to ameliorate the harsh tax consequences that can result from the necessity of accounting for certain exceptional economic events within the confines of an arbitrary annual accounting period." 500 F. 2d, at 1232.

as we must, that inequality is not unknown in income taxation, that an adverse event of year A does not ordinarily soften the tax impact upon a prior or subsequent and more prosperous year B, that this is a consequence of the fact that income and the taxes thereon are computed on an annual basis, see *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 363 (1931); *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326 (1932), and that "'general equitable considerations' do not control the question of what deductions are permissible," *United States* v. *Olympic Radio & Television*, 349 U. S. 232, 236 (1955); *Lewyt Corp.* v. *Commissioner*, 349 U. S. 237, 240 (1955), the fact remains that the carryback and carryover provisions, as noted above, were *designed* to provide a leveling influence on the peaks and valleys and to have the taxpayer's burden be one that is more realistic and in tune with actual economic gain. Thus, "where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer." *Ibid.* This is accomplished, it seems to me, by deeming a net operating loss as "carried" to taxable income only to the extent there is an actual setoff. Despite the Court's intimation to the contrary, *ante*, at 43–44, this effectuates only fairness, not perfection. No one expects perfection in income taxation.

3. As the Government applies its theory to this taxpayer, the results are startling. Had the capital gain of fiscal 1966 been realized in its entirety in fiscal 1967, the taxpayer's net operating loss excess (remaining after washing out the small net operating income of fiscal 1966) would be applied in its entirety against the larger net operating income of 1967. The result is that the taxpayer's total income taxed for 1966–1968 would then be its actual net economic gain for that period. The same would be true if the taxpayer's fiscal 1967 net operating income had been realized in fiscal

1966. But under the Government's—and the Court's—analysis, solely because the taxpayer realized capital gain in fiscal 1966, the net operating loss of 1968 is said to be totally "absorbed" in 1966 even though the "absorption" is imaginary and little less than mystical.

The Government's "absorption" serves to make the "income" taxed for the aggregate period exceed the taxpayer's actual economic gain by the amount of the so-called "absorption." The result thus depends on happenstance, that is, on whether the capital gain comes earlier or later. This totally defeats the ameliorative purpose of the carryback and carryover legislation and, it seems to me, is punitive in application.[6] On this approach, the taxpayer, to the extent business exigencies permit, is forced to time capital gain in accord with its estimate of unknown and unforeseeable net operating income or loss in future tax years. And it is hardly an answer to claim, as the Government does, that the "absorption" of the excess in fiscal 1966 really did not serve to increase the amount taxed for the aggregate period. No taxpayer, struggling with the realities of the business and tax worlds, will ever be convinced that the allowance of a deduction by words when coupled with its disallowance by administrative fiat, does not result in the taxpayer's being taxed on more economic gain than it has realized. In contrast, the application of consistent prior judicial decisions, see paragraph 4, *infra,* would better accord with economic reality, and would treat corporate taxpayers with stable income and those with fluctuating income over the "carry" period more nearly the same.

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[6] Judge Raum, in my view, stated it correctly:

"The computation under the 'regular' method was merely tentative, to determine whether the 'regular' method would produce a smaller tax. Since it did not produce a smaller tax, it was in effect not employed at all as a measure of petitioner's 1962 tax, and under the actual computation used (the 'alternative' method) only $1,115.57 of the net operating loss was absorbed, leaving the remaining $10,342.64 to be carried forward to 1965. This result is required by a proper interpretation of the provisions dealing with carrybacks and carryovers.

. . . . .

"We think it is to exalt form over substance to contend that, since a 'regular' computation was made in order to determine whether the amount of tax resulting therefrom was greater than that produced by the 'alternative' method of computation, and since the net operating loss was deducted in full in the 'regular' method, the entire loss was therefore taken into account in the tax computation, even though the 'alternative' method, to which only $1,115.57 was applied, ultimately produced petitioner's actual tax liability." *Chartier Real Estate Co.* v. *Commissioner,* 52 T. C., at 357, 358.

4. Decisions in favor of the taxpayer's position provided an unbroken line of authority in the Tax Court,[7] in the District Courts,[8] and in the Courts of Appeals,[9] until the Fourth Circuit, under the Government's persistence and by a divided vote, concluded otherwise.[10] *Mutual Assurance*

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[7] *Chartier Real Estate Co.* v. *Commissioner,* 52 T. C., at 356–358 (Judge Raum); *Mutual Assurance Soc.* v. *Commissioner,* 32 TCM 839, ¶ 73,177 P-H Memo TC (1973) (Judge Quealy); *Axelrod* v. *Commissioner,* 32 TCM 885, ¶ 73,190 P-H Memo TC (1973) (Judge Featherston); *Continental Equities, Inc.* v. *Commissioner,* 33 TCM 812, ¶ 74,189 P-H Memo TC (1974) (Judge Tannenwald). See *Lone Manor Farms, Inc.* v. *Commissioner,* 61 T. C. 436 (1974), aff'd, 510 F. 2d 970 (CA3 1975).

[8] *Olympic Foundry Co.* v. *United States,* 72–1 USTC ¶ 9299 (WD Wash. 1972); *Naegele* v. *United States,* 73–2 USTC ¶ 9696 (Minn. 1973), appeal docketed, No. 73–1921 (CA8); *Data Products Corp.* v. *United States,* 74–2 USTC ¶ 9759 (CD Cal. 1974).

[9] *Chartier Real Estate Co.* v. *Commissioner,* 428 F. 2d 474 (CA1 1970); *Olympic Foundry Co.* v. *United States,* 493 F. 2d 1247 (CA9 1974); *Foster Lumber Co.* v. *United States,* 500 F. 2d 1230 (CA 1974) (case below); *Data Products Corp.* v. *United States,* No. 74–3341 (CA9, Dec. 27, 1974), cert. pending, No. 74–996.

[10] Scholarly commentary, however, has not been uniform. See Hawkins, Mechanics of Carrying Losses to Other Years, 14 W. Res. L. Rev. 241, 250–251 (1963), and D. Herwitz, Business Planning 844 (1966), both pre-*Chartier.* Compare Note, 8 San Diego L. Rev. 442 (1971), Note, 55 B. U. L. Rev. 134 (1975), and May, Net Operating Losses and Capital Gains—a Deceptive Combination, 29 Tax Lawyer 121 (1975), with

*Soc.* v. *Commissioner,* 505 F. 2d 128 (1974).[11] Where, as here, we are concerned with technical and what the Government calls "the highly detailed provisions of Section 172," Brief for United States 6, the Tax Court's expertise is at its most valuable level and should be sought out and accorded deference. See the comment of Mr. Justice Jackson, dissenting, in *Arrowsmith* v. *Commissioner,* 344 U. S. 6, 12 (1952), concerning the Tax Court's competence and "steady influence" in "a field beset with invisible boomerangs."[12] But the Court accords no deference to the Tax Court's consistent position on the technical problem before us.

The reasoning in *Chartier Real Estate Co.* v. *Commissioner,* 52 T. C. 346 (1969), aff'd, 428 F. 2d 474 (CA1 1970), and the several cases that followed it, accommodates the respective congressional purposes behind the capital gain and the "carry" provisions. In *Chartier* the Government's dual position—seeking to prevent the application of the loss carryback to the earlier year's capital gain, and also claiming that the carryback nevertheless was absorbed by the capital gain—sought the best of two worlds. Its first proposition

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Branda, Net Operating Losses and Capital Gains—Some Bizarre Consequences of the Alternative Tax Computation, 28 Tax Lawyer 455 (1975). In the last article the author concludes:

> "*Chartier* and its progeny . . . despite strained reliance on the language of section 172(b)(2) . . . are more soundly based on the policy underlying the favorable treatment of capital gains. . . .
>
> "The reversals of the Tax Court by the Fourth and Sixth Circuits . . . are unconvincing." *Id.,* at 470.

See also Pratt & Scolnick, The Net Operating Loss Deduction: Disagreement Among Circuit Courts Creates Confusion, 53 Taxes 274 (1975); Nagel, Planning to Avoid Wastage of NOL Carryovers: A Lesson from Chartier Realty, 42 J. Taxation 26 (1975).

[11] Subsequently, the Sixth Circuit, in a case concerning individual taxpayers, agreed with the Fourth Circuit. *Axelrod* v. *Commissioner,* 507 F. 2d 884 (1974).

[12] See also Remarks of MR. JUSTICE STEWART at the Dedication of the New Courthouse of the United States Tax Court, 28 Tax Lawyer 451, 453 (1975).

was upheld. Its second proposition was rejected, and properly so, because the acceptance of the former precluded acceptance of the latter if congressional policy were to be recognized.

No effort was made in Congress to change the statutes in order to overcome the judicial interpretation that was uniform until 1974. That, for me, as Judge Russell pertinently observed in dissent in *Mutual Assurance*, 505 F. 2d, at 138, "is a persuasive testimonial that those decisions set forth the proper construction of the statutes." And the Government acknowledged at oral argument that the Internal Revenue Service sought no clarifying legislation in the Congress. Tr. of Oral Rearg. 18–20.

5. The legislative history reflects a proper concern for achieving a tax structure that operates fairly on income that fluctuates. Amelioration provisions are not new and, in fact, appeared in the income tax law as early as the Revenue Act of 1918. § 204 (b) of that Act, 40 Stat. 1061. Since 1939 the periods for carrybacks and carryovers have been expanded[13] from the two-year carryover of 1939 until, in 1958 and lasting until 1976, a structure of a three-year carryback and a five-year carryover was erected.[14] It was said later that for "most companies" this period "is long enough to absorb all of their losses against income." S. Rep. No. 1881, 87th Cong., 2d Sess., 129 (1962).

6. The Court today accepts the Government's contention

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[13] Revenue Act of 1939, § 211 (b) (adding § 122 to the Internal Revenue Code of 1939), 53 Stat. 867; Revenue Act of 1942, § 153 (a), 56 Stat. 847; Revenue Act of 1950, § 215 (a), 64 Stat. 937; Internal Revenue Code of 1954, § 172 (b), 68A Stat. 63; Technical Amendments Act of 1958, § 203 (a), 72 Stat. 1678.

[14] The Tax Reform Act of 1976, § 806 (a), 90 Stat. 1598, adds to § 172 (b)(1)(B) of the Code, as amended, a sentence providing that for any taxable year ending after December 31, 1975, a net operating loss may be carried over for seven years following the loss. This thus increases the carryover period from five to seven years.

that the meaning of the critical § 172 (b)(2)[15] is clearly and unambiguously against the taxpayer. It is said that the phrase "to which such loss may be carried" obviously modifies "each of the prior taxable years," rather than "taxable income."[16] That the language of the statute is *not* clearly in favor of the Government is demonstrated, if by no other means, by the existing conflict among the Circuits and by the decisions of the Districts Courts and of the Tax Court, cited above in nn. 7, 8, and 9, that have run so uniformly against the Government. If the language were as clear and unambiguous in the Government's favor as is contended, it hardly could have been read otherwise by so many capable and experienced judges. And the clear meaning which the Court now perceives does not, and cannot, comport with the underlying purpose of the carryback and carryover provisions.

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[15] Until the Tax Reform Act of 1976, § 172 (b)(2) read:

"Except as provided in subsections (i) and (j) [not pertinent here], the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the 'loss year') shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. . . ."

Section 1901 (a)(29)(C)(iv) of the 1976 Act, 90 Stat. 1769, replaced the phrase "subsections (i) and (j)" with "subsection (g)."

The words "to which such loss may be carried" first appeared in the 1954 Code. 68A Stat. 63. Apparently there is no committee or other legislative commentary on the addition of these words to § 172 (b)(2).

[16] The Government's—and now the Court's—argument that the phrase "to which such loss may be carried" must modify "each of the prior taxable years," and is confined in its modification to that phrase, is surely wrong as a matter of routine statutory construction. This is so because that analysis renders the modifying phrase useless and redundant. The preceding §§ 172 (a) and (b)(1) already have directed that the loss be carried, and in the prescribed order, to specified taxable years. There is no additional need for § 172 (b)(2) to recite a limitation of the years to which the loss may be carried.

7. The definition of § 172 (c),[17] to the effect that a taxable year does not result in a net operating loss when capital gain of that year exceeds any deficit in ordinary income, does not defeat the taxpayer. Congress was definite and specific in its definition of "net operating loss" for "carry" purposes in a tax year of that kind. But we are not concerned here with such a year and such a definition. We are concerned, instead, with 1968 where this taxpayer had a "net operating loss" and no capital gain or loss. That net operating loss is established and *is* available for "carry." The definitional restriction of § 172 (c) obviously has no application to 1968 for this taxpayer.

Nor is § 172 (d)(2)(B) contrary to the taxpayer's position. Section 172 (d)(2) is restricted in its application to "a taxpayer other than a corporation." Corporate and individual taxpayers frequently are treated differently in our income tax structure, and I find little of assistance, even by way of inference, in § 172 (d)(2)(B) for resolving the issue before us in connection with a corporate taxpayer.

8. "Taxation is a practical matter." *Harrison* v. *Schaffner*, 312 U. S. 579, 582 (1941). To do what the Court does today is to ignore that wise precept. What the Government urges—and the Court does—promotes inequality of treatment between taxpayers experiencing like economic gains over the "carry" period, whenever a capital gain happens to be present in one taxpayer's taxable year but happens to be absent in

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[17] Until the Tax Reform Act of 1976, § 172 (c) read:

"For purposes of this section, the term 'net operating loss' means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d)."

The parenthetical expression was eliminated by § 1901 (a)(29)(B) of the 1976 Act, 90 Stat. 1769.

the same year for another taxpayer. A provision intended to equalize to a great extent the tax burdens as between corporations with fluctuating income and those with stable income should not be used to render that goal unattainable or to introduce irrationalities.

I would affirm the judgment of the Court of Appeals.

# SCOTT *v.* KENTUCKY PAROLE BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74-6438. Argued October 12, 1976—Decided November 2, 1976

Judgment vacated and case remanded for consideration of mootness.

*Dean Hill Rivkin* argued the cause for petitioner. With him on the briefs were *Robert Allen Sedler, Howard Lesnick, David Murrell,* and *Alvin J. Bronstein.*

*Patrick B. Kimberlin III,* Assistant Attorney General of Kentucky, argued the cause for respondents. With him on the brief were *Robert F. Stephens,* Attorney General, and *William W. Pollard,* Assistant Attorney General.*

PER CURIAM.

It appearing that petitioner Scott has been granted parole by the Kentucky Parole Board, the judgment of the United States Court of Appeals for the Sixth Circuit is hereby vacated, and the case is remanded to the Court of Appeals for consideration of the question of mootness.

*So ordered.*

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

The Court granted certiorari to decide whether any constitutionally mandated procedural safeguards apply to parole release hearings. At such a hearing a prisoner may be denied parole, or he may be released subject to specified conditions. The constitutional issue is whether either the outright denial, or the imposition of parole conditions, has the kind

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**Solicitor General Bork, Assistant Attorney General Thornburgh, Deputy Solicitor General Jones,* and *Shirley Baccus-Lobel* filed a brief for the United States as *amicus curiae* urging affirmance.

of impact on liberty that must be preceded by "due process." The question is extremely important,[1] it has been fully briefed and argued and, in my opinion, should now be decided.[2]

The Court postpones decision of the issue by sending the case back to the Court of Appeals for its advice on the question whether the litigation is now moot. This action might appear to be supported by *Weinstein* v. *Bradford*, 423 U. S. 147, a case which became moot because the petitioner's sentence terminated prior to our decision, thus entirely eliminating his interest in any controversy with his parole board.[3] This case, however, is not moot, as a brief reference to the facts will demonstrate.

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[1] Its manifest importance is demonstrated by (a) the vast number of parole release decisions that are made every year; (b) the importance of each such decision to the person affected by it; and (c) the extensive litigation, with varying results, which has developed in the federal courts. The conflict in the Circuits over this question is more than evident. Compare the present case, *Scott* v. *Kentucky Parole Board*, No. 74-1899 (unpublished order Jan. 15, 1975), in which the Sixth Circuit held that the requirements of due process are not applicable to parole release hearings, with the following: *Brown* v. *Lundgren*, 528 F. 2d 1050 (CA5 1976) (due process does not apply); *United States ex rel. Richerson* v. *Wolff*, 525 F. 2d 797 (CA7 1975) (due process applies to the extent that a written statement of reasons must be given for denial of parole), cert. denied, 425 U. S. 914; *Bradford* v. *Weinstein*, 519 F. 2d 728 (CA4 1974) (due process applies), vacated as moot, 423 U. S. 147; *Childs* v. *U. S. Board of Parole*, 167 U. S. App. D. C. 268, 511 F. 2d 1270 (1974) (due process applies to the extent that reasons must be given); *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F. 2d 925 (CA2 1974) (due process applies to the extent that reasons must be given), vacated as moot *sub nom. Regan* v. *Johnson*, 419 U. S. 1015; *Scarpa* v. *U. S. Board of Parole*, 477 F. 2d 278 (CA5 1973) (en banc) (due process does not apply), vacated and remanded to consider mootness, 414 U. S. 809, dismissed as moot, 501 F. 2d 992 (1973); *Menechino* v. *Oswald*, 430 F. 2d 403 (CA2 1970) (due process does not apply to parole hearings; questioned in *United States ex rel. Johnson, supra*), cert. denied, 400 U. S. 1023. See also *Burton* v. *Ciccone*, 484 F. 2d 1322 (CA8 1973) (parole board must follow its own rules, but implicitly holding that due process does not apply).

[2] The briefs and argument fully discuss the mootness issue as well as the merits.

On July 26, 1974, the petitioner Ewell Scott filed a complaint alleging that in November 1973 the Kentucky Parole Board denied him parole. He contended that the denial of parole deprived him of liberty without due process of law because the Parole Board had not provided him the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment.[4] He sought to represent similarly situated prisoners and requested an injunction requiring the Parole Board to modify its procedures and such other relief as the court might consider appropriate. Without bothering to effect service on the defendants, the District Court dismissed the complaint. The Court of Appeals affirmed in an unreported order and this Court granted certiorari, 423 U. S. 1031.

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[3] The *Weinstein* opinion is unambiguous:

"It is undisputed that respondent was temporarily paroled on December 18, 1974, and that this status ripened into a complete release from supervision on March 25, 1975. From that date forward it is plain that respondent can have no interest whatever in the procedures followed by petitioners in granting parole." 423 U. S., at 148.

This rationale is, of course, inapplicable to this petitioner who remains in legal custody. See *In re Sturm,* 11 Cal. 3d 258, 264–265, 521 P. 2d 97, 101 (1974); *Ramer* v. *Saxbe,* 173 U. S. App. D. C. 83, 91–92, 522 F. 2d 695, 703–704 (1975); *Workman* v. *Mitchell,* 502 F. 2d 1201, 1208 (CA9 1974); *Morales* v. *Schmidt,* 489 F. 2d 1335, 1336 (CA7 1973), adhered to en banc, 494 F. 2d 85 (1974). This Court has noted that 35%–45% of all paroles are revoked. See *Morrissey* v. *Brewer,* 408 U. S. 471, 479. As long as a parolee faces such odds, he retains a continuing interest in the procedures which will be followed at future parole release hearings.

[4] He contends that he should have received the procedural safeguards encompassed in an adjudicatory-type hearing, including notice concerning the issues and information the Board would be considering; access to the file and other information the Board would rely upon; the opportunity to present evidence and arguments to justify release and challenge or interpret evidence already before the Board; representation by an attorney or lay advocate; a transcript or summary of testimony from the hearing; and a reasoned decision by the Board. If the Court should hold that the Due Process Clause is applicable, it would not, of course, follow that petitioner would be entitled to all of the claimed safeguards. Cf. *Morrissey* v. *Brewer, supra,* at 488–490.

On November 26, 1975, shortly prior to our grant of certiorari, the petitioner was paroled. The respondent Board then suggested that the case had become moot. But, as petitioner points out in his reply, he remains subject to significant restraints that might not have been imposed if he had received the kind of hearing that he claims the Constitution requires. The petitioner is on "close parole supervision," a restrictive status entailing parole conditions in addition to those imposed as a routine matter. One special condition requires petitioner to undergo outpatient treatment at a local mental health center. This parole condition imposes a significant restraint on his liberty.

Petitioner claims that a fair hearing might have avoided this condition. If the Court should decide this case in his favor on the merits, the Court unquestionably would have power to order the objectionable condition removed unless petitioner is accorded an appropriate hearing. For that reason petitioner retains a direct and immediate interest in the outcome of this litigation, and the Court retains the power to decide the case on the merits. It follows inexorably that the case is not moot. "It is sufficient," as noted in *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115, 125–126, "that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest."

Although I have no doubt that the mootness issue will be correctly decided after the proceedings on remand have run their course, the remand is nevertheless unfortunate. As dispositions in each of the last three years demonstrate, the underlying issue is one that is capable of repetition, yet review is repeatedly evaded.[5] Delay in deciding the merits will affect not only these litigants, but also other pending litigation and parole procedures in every jurisdiction in the country. A suggestion of mootness which this Court can readily decide should not be permitted to have such far-reaching consequences.

I respectfully dissent.

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[5] *Scarpa* v. *U. S. Board of Parole, supra; United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra; Bradford* v. *Weinstein, supra.*

# PARKER SEAL CO. *v.* CUMMINS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-478. Argued October 12, 1976—Decided November 2, 1976

516 F. 2d 544, affirmed by an equally divided Court.

*Leonard H. Becker* argued the cause for petitioner. With him on the briefs was *Paul S. Ryerson.*

*Thomas L. Hogan* argued the cause for respondent. With him on the briefs was *James C. Hickey.*

*Deputy Solicitor General Wallace* argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Mark L. Evans, Brian K. Landsberg, Dennis J. Dimsey, Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg,* and *Gerald D. Letwin.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.†

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

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*Briefs of *amici curiae* urging reversal were filed by *John O'B. Clarke, Jr., William G. Mahoney,* and *Plato E. Papps* for the International Association of Machinists and Aerospace Workers, and by *Dick H. Woods* and *George E. Feldmiller* for Trans World Airlines, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Warren L. Johns, Philip B. Kurland,* and *Alan L. Unikel* for the Seventh-Day Adventist Church; by *James W. Respess* for the Americans United for Separation of Church and State; by *Nathan Lewin, Dennis Rapps,* and *Howard I. Rhine* for the National Jewish Commission on Law and Public Affairs; and by *Leo Pfeffer* for the Synagogue Council of America et al.

†[REPORTER'S NOTE: On rehearing this judgment and the judgment of the Court of Appeals were vacated, and the case was remanded for further consideration. 433 U. S. 903 (1977).]

# MASSACHUSETTS ET AL. v. FEENEY

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 76-265. Decided November 8, 1976

The question whether Massachusetts law authorizes the Massachusetts Attorney General to appeal from the Federal District Court's judgment against certain state officers he represented in that court notwithstanding their expressed opposition to the appeal, is certified to the Massachusetts Supreme Judicial Court in the absence of any clearly controlling decision on the question by that court.

415 F. Supp. 485, question certified.

PER CURIAM.

This Court, on its own motion, hereby certifies to the Supreme Judicial Court of the Commonwealth of Massachusetts, pursuant to Rule 3:21 of the Rules of that court, the question of law hereinafter set forth.

*Statement of Facts*

On March 29, 1976, a three-judge Federal District Court in the District of Massachusetts, after dismissing the Commonwealth of Massachusetts and its Division of Civil Service as parties defendant, entered a judgment for Helen B. Feeney against the Massachusetts Director of Civil Service (now designated "Personnel Administrator of the Commonwealth") and members of the Massachusetts Civil Service Commission, declaring unconstitutional the Massachusetts veterans' preference statute, Mass. Gen. Laws c. 31, § 23, and enjoining its enforcement by said state officers. 415 F. Supp. 485 (1976).

The Attorney General for the Commonwealth, who appeared for all parties defendant in the District Court, has filed a Jurisdictional Statement in this Court stating, at 1-2, that the same is filed "on behalf of the Personnel Administrator of the Commonwealth and the Massachusetts

Civil Service Commission," the state officers against whom the District Court judgment was entered. However, the Personnel Administrator of the Commonwealth and the members of the Civil Service Commission have advised the Clerk of this Court, by letter of September 1, 1976, that "the appeal is without our authorization," that "each of us informed the Attorney General of our request that this matter not be appealed," and that "we request that the Court dismiss the appeal." A stipulation filed in the District Court dated June 21, 1976, signed by the Attorney General and the attorney for appellee, confirms these statements in the letter, and states further that the Governor of the Commonwealth has also requested the Attorney General not to prosecute an appeal.

The Attorney General, on October 8, 1976, filed a brief in this Court supporting his authority under state law to docket the appeal.

It therefore appears that there are involved in the proceeding before this Court questions of Massachusetts law which may be determinative of such cause, with respect to which there seem to be no clearly controlling precedents in the decisions of the Massachusetts Supreme Judicial Court. Accordingly, this Court desires to certify to the Supreme Judicial Court of Massachusetts, pursuant to Rule 3:21 of its Rules, the following question:

*Question Certified*

Under the circumstances herein presented, does Massachusetts law authorize the Attorney General of the Commonwealth to prosecute an appeal to this Court from the judgment of the District Court without the consent and over the expressed objections of the state officers against whom the judgment of the District Court was entered?

MR. JUSTICE BLACKMUN would dismiss the appeal for want of jurisdiction.

# TULLY ET AL. *v.* GRIFFIN, INC.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

No. 75-831. Argued October 4, 1976—Decided November 9, 1976

The Tax Injunction Act, 28 U. S. C. § 1341, which prohibits federal district courts from enjoining the assessment, levy, or collection of state taxes where "a plain, speedy and efficient remedy may be had in the courts of such State," *held* to bar appellee Vermont furniture store's suit in Federal District Court for injunctive relief against allegedly unconstitutional assessment of New York sales taxes on appellee's sales to New York customers, since New York provides a "plain, speedy and efficient" means for redress of appellee's constitutional claims while preserving the right to challenge the amount of taxes due. Despite New York statutes providing that judicial review of an administrative determination shall be a taxpayer's only remedy, other procedures, including a declaratory judgment action, may be used in New York courts when the claim is that the tax is unconstitutional, *Ammex Warehouse Co.* v. *Gallman,* 414 U. S. 802. Moreover, appellee need not accept as binding the amount of the assessment as a price of challenging the constitutionality of the tax but can obtain a preliminary injunction in state court that will toll the running of the 90-day period within which appellee may challenge such amount at an administrative hearing. Pp. 73–77.

404 F. Supp. 738, vacated and remanded.

STEWART, J., delivered the opinion for a unanimous Court.

*Thomas P. Zolezzi,* Assistant Attorney General of New York, argued the cause for appellants. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Solicitor General.

*R. Paul Wickes* argued the cause for appellee. With him on the brief was *John H. Williams II.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether New York provides a "plain, speedy and efficient" remedy to an out-of-state corporation that seeks to challenge New York's assessment of sales taxes against it. The United States District Court for the District of Vermont held that New York does not provide such a remedy, and issued a preliminary injunction restraining the collection of the New York taxes. 404 F. Supp. 738. We noted probable jurisdiction of the appeal, 424 U. S. 907.

## I

The appellee, Griffin, Inc., is a Vermont corporation that operates a furniture store in Arlington, Vt., six miles from the New York-Vermont border. It advertises on radio and television and in newspapers that serve the Albany-Schenectady-Troy area of New York, and makes substantial sales at its place of business to customers from that State. It regularly delivers furniture to the New York buyers in its own trucks, and its employees also enter New York on occasion to repair furniture it has sold.

In February 1973, the New York Department of Taxation and Finance determined that Griffin was "doing business" in New York and thus was required to collect state and local sales taxes from its New York customers. The Department sent a tax examiner to Vermont to audit Griffin's records, but Griffin refused its consent. Little more happened until March 1975, when the Department reaffirmed its position and advised Griffin that another tax examiner would soon be dispatched for an audit. Griffin responded by filing suit in the United States District Court for the District of Vermont, alleging generally that any assessment, levy, or collection of sales taxes against it would violate the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution, and asking for injunctive relief. A three-judge court was convened.

After Griffin again denied the tax examiner access to its records, the Department issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due."

This assessment, by necessity only an estimate, demanded that Griffin pay $218,085.37 in back taxes, interest, and penalties.[1] Griffin moved in the federal court for a preliminary injunction to prevent steps from being taken to collect the taxes and to stay the running of the 90-day period in which it could contest the amount shown in the Notice of Determination.[2] The defendant New York tax officials filed a cross-motion to dismiss the action for lack of jurisdiction, claiming that suit was barred by the Tax Injunction Act, 28 U. S. C. § 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The District Court rejected this defense, ruling that New York law does not provide Griffin "a plain, speedy and efficient remedy."

In reaching this conclusion, the federal court considered first the availability under New York law of direct review of the Notice of Determination. Under New York Tax Law § 1138 (a), a taxpayer has 90 days from the receipt of a notice of determination to apply for a hearing before the Tax Commission.[3] The Tax Commission's decision after the

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[1] The Department later withdrew this initial Notice of Determination and issued another demanding payment of $298,580.59.

[2] See N. Y. Tax Law § 1138 (a) (McKinney 1975).

[3] New York Tax Law § 1138 (a) (McKinney 1975) provides:

"(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax hearing is judicially reviewable "for error, illegality or unconstitutionality or any other reason whatsoever" in a proceeding under Art. 78 of New York's Civil Practice Law and Rules.[4] Before a taxpayer may seek Art. 78 review, however, he must either prepay or post a bond for the amount of the assessment. The court found that Griffin lacked the means to do this. Although the assessment was only a gross estimate, the court assumed that the amount would not be changed unless Griffin submitted to an audit. It ruled that Griffin should not be required to "tur[n] over its books and records to a state whose authority it claims is invalid," and

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unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application."

[4] N. Y. Civ. Prac. Law, Art. 78, § 7801 *et seq.* (McKinney 1963).

further questioned whether a New York court would entertain an Art. 78 proceeding if Griffin refused to be audited. 404 F. Supp., at 743–745.

The District Court then considered the availability of declaratory relief under § 3001 of New York's Civil Practice Law and Rules.[5] It viewed this possible avenue of relief as insufficiently "plain, speedy and efficient" because N. Y. Tax Law § 1140 on its face seems to limit review of sales tax liability to the Art. 78 procedure discussed above.[6] Although the court took note of substantial federal and New York case law holding that New York's administrative review proceedings are not in fact exclusive where a plaintiff claims that a tax is unconstitutional, the court concluded that the issue was "cloak[ed] . . . in some uncertainty." Even if Griffin could get declaratory relief, the court held, its contacts with New York were so "minimal" that "it seems unfair to make Griffin litigate in an unfamiliar forum." Finally, the court expressed "reservations" about Griffin's ability to get a preliminary injunction pending a New York court's decision in a declaratory judgment suit. 404 F. Supp., at 745–747. On the basis of this reasoning the District Court granted Griffin preliminary injunctive relief.

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[5] New York Civ. Prac. Law § 3001 (McKinney 1974) provides:

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. . . ."

[6] New York Law § 1140 (McKinney 1975) provides:

"The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by any action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules."

## II

A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost. See *Hillsborough* v. *Cromwell,* 326 U. S. 620, 622–623; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 297–299; *Matthews* v. *Rodgers,* 284 U. S. 521, 525–526. This policy of restraint has long been reflected and confirmed in the congressional command of 28 U. S. C. § 1341 that no injunction may issue against the collection of a state tax where state law provides a "plain, speedy and efficient remedy." As the Court has frequently had occasion to note, the statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations. "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially when the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax." *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* at 298. See also *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463; *Hillsborough* v. *Cromwell, supra,* at 622–623; *Matthews* v. *Rodgers, supra,* at 525–526.

These principles do not lose their force, and a State's remedy does not become "inefficient," merely because a taxpayer must travel across a state line in order to resist or challenge the taxes sought to be imposed. If New York provides an otherwise adequate remedy, the mere fact that Griffin must go to New York to invoke it does not jeopardize its ability to assert its rights. To accept the District Court's holding that it would be "unfair" to make Griffin litigate in

New York would undermine much of the force of 28 U. S. C. § 1341.

We turn then to the basic inquiry—whether under New York law there is a "plain, speedy and efficient" way for Griffin to press its constitutional claims while preserving the right to challenge the amount of tax due. This Court answered the first part of that question by its summary judgment of affirmance three years ago in *Ammex Warehouse Co.* v. *Gallman,* 414 U. S. 802. In that case, the New York Tax Commission had assessed state alcoholic beverage, tobacco, and sales taxes against two New York companies that sold cigarettes and liquor to persons about to leave the State to enter Canada. The companies brought suit in Federal District Court, claiming that the assessment of the taxes against them violated the Commerce and Import-Export Clauses of the Constitution. The three-judge District Court held that 28 U. S. C. § 1341 required dismissal of the action. *Ammex-Champlain Corp.* v. *Gallman,* 72 Civ. 306 (NDNY, Mar. 15, 1973) (unreported). The court held that "[t]here is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. . . . Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional."

The correctness of that holding was placed squarely before us by the Jurisdictional Statement that the appellants filed in this Court in the *Ammex* case. This Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by this Court. *Hicks* v. *Miranda,* 422 U. S. 332, 343–345. Since, however, it was a summary affirmance, it is not here "of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan,* 415 U. S. 651, 671. But having now had a full opportunity to consider the issue after briefing and argument, we adhere to our judgment in the *Ammex* case.

The District Court's ruling in that case was fully supported by New York decisional law. Despite the provisions of its taxing statutes that provide that judicial review of an administrative determination shall be a taxpayer's only remedy, the New York courts have consistently held that other procedures, including an action for a declaratory judgment, may be used when the claim is that the tax is unconstitutional. *Slater* v. *Gallman,* 38 N. Y. 2d 1, 4, 339 N. E. 2d 863, 864 (1975); *In re First Nat. City Bank* v. *City of New York Finance Admin.,* 36 N. Y. 2d 87, 92–93, 324 N. E. 2d 861, 864 (1975); *Richfield Oil Corp.* v. *City of Syracuse,* 287 N. Y. 234, 239, 39 N. E. 2d 219, 221 (1942); *Dun & Bradstreet, Inc.* v. *City of New York,* 276 N. Y. 198, 206, 11 N. E. 2d 728, 731–732 (1937); *Hospital TV Sys., Inc.* v. *State Tax Comm'n,* 41 App. Div. 2d 576, 339 N. Y. S. 2d 603 (1973). Thus, we remain fully persuaded that the District Court's holding in *Ammex* was correct, announced as it was by three New York federal judges "who are familiar with the intricacies and trends of local law and practice," *Bishop* v. *Wood,* 426 U. S. 341, 346 n. 10, quoting *Hillsborough* v. *Cromwell, supra,* at 630, quoting *Huddleston* v. *Dwyer,* 322 U. S. 232, 237.

It also seems clear that under New York law Griffin can fully preserve its right to challenge the amount of tax due while litigating its constitutional claim that no tax at all can validly be assessed against it. Griffin, in other words, need not accept as binding the Tax Commission's rough estimate of its sales tax liability as a price of challenging the constitutionality of the tax.

The New York Attorney General in his brief and in oral argument has represented to this Court that Griffin can obtain a preliminary injunction in state court that will toll the running of the 90-day period within which Griffin may challenge the amount of the assessment at an administrative hearing.[7] Moreover, we have no reason to believe that a New York court, acting *sua sponte,* would question its ability to award preliminary relief in a proper case.

The District Court cited no New York authority for its "reservations" on this score, and we have found none. To the contrary, a New York statute speaks of the availability of a preliminary injunction "in any action" where certain conditions are met. N. Y. Civ. Prac. § 6301 (McKinney 1963). There are New York cases suggesting that courts may award preliminary relief in declaratory judgment actions in general, see, *e. g., In re Public Serv. Comm'n* v. *Norton,* 304 N. Y. 522, 529, 109 N. E. 2d 705, 708 (1952); *Opoliner* v. *Joint Queensview Housing Enterp., Inc.,* 11 App. Div. 2d 1076, 206 N. Y. S. 2d 681 (1960), and several New York courts have done so in cases involving the collection of taxes. See, *e. g., Stacy* v. *State,* 82 Misc. 2d 181, 368 N. Y. S. 2d 448 (Sup. Ct. 1975) (sales tax); *Glen Cove Theatres, Inc.* v. *City of Glen Cove,* 231 N. Y. S. 2d 747 (Sup. Ct. 1962). See also *Dun & Bradstreet, Inc.* v. *City of New York, supra,* at 206, 11 N. E. 2d, at 731–732 (permanent injunction approved in declaratory judgment action challenging imposition of sales tax). Although we have held that uncertainty concerning a State's remedy may make it less than "plain" under 28 U. S. C. § 1341, see *Hillsborough* v. *Cromwell,* 326 U. S., at 625, these New York precedents convincingly demonstrate that Griffin's fears about the availability of such preliminary relief are unfounded.[8]

Since New York provides a "plain, speedy and efficient" means for the redress of Griffin's constitutional claims, the

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[7] Although acknowledging a New York court's *power* to issue a preliminary injunction in these circumstances, the Attorney General remains free, of course, to oppose the granting of such relief in any particular case.

[8] As we conclude that Griffin has an adequate remedy in a suit for a declaratory judgment, we need not decide whether judicial review under N. Y. Civ. Prac. Art. 78 would also be "plain, speedy and efficient."

District Court should not have granted injunctive relief. Its judgment granting Griffin's motion for a preliminary injunction is vacated, and the case is remanded to that court with instructions to dismiss the complaint.

*It is so ordered.*

# MOODY *v.* DAGGETT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 74-6632. Argued October 12, 1976—Decided November 15, 1976

Petitioner federal parolee, imprisoned for federal crimes committed while on parole and clearly constituting parole violations, *held* not to be constitutionally entitled to an immediate parole revocation hearing, where a parole violator warrant was issued and lodged with the institution of his confinement as a "detainer" but was not executed. Pp. 85-89.

(a) Petitioner's present confinement and consequent liberty loss do not derive from the parole violator warrant but from his convictions for the crimes committed while on parole. Execution of a parole violator warrant and custody thereunder are the operative events triggering any loss of liberty attendant upon parole revocation. *Morrissey* v. *Brewer,* 408 U. S. 471, 488. Pp. 85-87.

(b) Deferral of the parole revocation decision until execution of the parole violator warrant does not deprive petitioner of the opportunity to serve any sentence imposed for parole violation concurrently with the sentences imposed for the crimes committed while on parole, since if the Parole Commission chooses to revoke parole, it has the power to grant, retroactively, the equivalent of concurrent sentences and to provide for unconditional or conditional release upon completion of the subsequent sentences. Pp. 87-88.

(c) Issuance of the parole violator warrant, without more, did not diminish petitioner's opportunity for parole on his intervening sentences, since the same Commission that will consider such parole will decide whether to revoke parole granted under the earlier conviction, and since the statutory hearing to which petitioner will be entitled upon his application for parole will give him the same opportunity to persuade the Commission that he should be released from custody as would an immediate hearing on the parole violator warrant. P. 88.

(d) As a practical matter, in cases such as this, in which the parolee has been convicted of an offense plainly constituting a parole violation, a decision to revoke parole would often be foreordained, so that given the predictive nature of the parole revocation hearing, it is appropriate that such hearing be held at the time at which prediction as to the parolee's ability to live in society without committing antisocial acts is both most relevant and most accurate—at the expiration of the parolee's intervening sentence. P. 89.

Affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 89.

*Phylis Skloot Bamberger,* by appointment of the Court, 425 U. S. 932, argued the cause and filed briefs for petitioner.

*Frank H. Easterbrook* argued the cause for respondent *pro hac vice.* With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, Jerome M. Feit,* and *George S. Kopp.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether a federal parolee imprisoned for a crime committed while on parole is constitutionally entitled to a prompt parole revocation hearing when a parole violator warrant is issued and lodged with the institution of his confinement but not served on him.[1]

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*Briefs of *amici curiae* urging affirmance were filed by *Andrew P. Miller,* Attorney General, and *Linwood T. Wells, Jr.,* Assistant Attorney General, for the Commonwealth of Virginia; and by *R. A. Ashley, Jr.,* Attorney General, *Robert E. Kendrick,* Deputy Attorney General, and *David L. Raybin,* Assistant Attorney General, for the State of Tennessee, joined by the Attorneys General for their respective States as follows: *Wayne L. Kidwell* of Idaho, *William F. Hyland* of New Jersey, *Jim Guy Tucker* of Arkansas, *Evelle J. Younger* of California, *R. Lee Johnson* of Oregon, *Francis B. Burch* of Maryland, *David R. McLeod* of South Carolina, *Paul L. Douglas* of Nebraska, *Robert F. Stephens* of Kentucky, *Rufus L. Edmisten* of North Carolina, *William J. Brown* of Ohio, and *William J. Scott* of Illinois.

[1] This constitutional issue has divided the Courts of Appeals. Three of the Circuits have concluded that a parolee convicted of crime com-

(1)

In 1962 petitioner was convicted in the United States District Court for the District of Arizona of the crime of rape on an Indian reservation, in violation of 18 U. S. C. § 1153. There was no appeal, and petitioner received a 10-year prison sentence. He was paroled in 1966 with almost six years remaining to be served. While on parole, petitioner shot and killed two persons on the Fort Apache Indian Reservation. He was convicted on a guilty plea of manslaughter as to one victim and second-degree murder as to the other, for violations of 18 U. S. C. § 1153; he received concurrent 10-year sentences for these two offenses. These crimes constituted obvious violations of the terms of petitioner's 1966 parole. See 18 U. S. C. § 4203 (a) (1970 ed. and Supp. V).

Soon after petitioner's incarceration for the two homicides, the United States Board of Parole issued but did not execute a parole violator warrant; this was lodged with prison officials as a "detainer."[2] Petitioner requested the Board to execute

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mitted while on parole is entitled to a due process hearing promptly upon issuance of the parole violator warrant and detainer. *Jones* v. *Johnston*, 175 U. S. App. D. C. 151, 534 F. 2d 353 (1976), cert. pending *sub nom. Sigler* v. *Byrd*, No. 76–355; *United States ex rel. Hahn* v. *Revis*, 520 F. 2d 632 (CA7 1975), mandate recalled, No. 74–1057 (Aug. 27, 1975); *Cleveland* v. *Ciccone*, 517 F. 2d 1082 (CA8 1975). Other Circuits have held that no due process requirements attach at this time. *Reese* v. *U. S. Bd. of Parole*, 530 F. 2d 231 (CA9 1976), cert. pending *sub nom. Reese* v. *U. S. Parole Comm'n*, No. 75–6703; *Gaddy* v. *Michael*, 519 F. 2d 669 (CA4 1975), cert. pending, No. 75–5215; *Orr* v. *Saxbe*, No. 74–341 (MD Pa., Nov. 27, 1974), aff'd without opinion, 517 F. 2d 1399 (CA3 1975), cert. pending *sub nom. Orr* v. *Levi*, No. 75–5594; *Colangelo* v. *U. S. Bd. of Parole*, No. 74–251 (WD Ohio, Dec. 11, 1974), aff'd without opinion, 517 F. 2d 1404 (CA6 1975); *Small* v. *Britton*, 500 F. 2d 299 (CA10 1974); *Cook* v. *U. S. Attorney General*, 488 F. 2d 667 (CA5), cert. denied, 419 U. S. 846 (1974).

[2] A detainer in this context is an internal administrative mechanism to assure that an inmate subject to an unexpired term of confinement will

the warrant immediately so that any imprisonment imposed for violation of his earlier parole under the rape conviction could run concurrently with his 1971 homicide sentences. The Board replied that it intended to execute the warrant only upon petitioner's release from his second sentence. At its 1974 annual review of petitioner's case, the Board reaffirmed its decision to allow the warrant to remain unexecuted.

Relying on *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), petitioner began this federal habeas corpus action in January 1975, seeking dismissal of the parole violator warrant on the ground that he had been denied a prompt hearing at which the pending parole revocation issues could be aired.

The District Court dismissed the petition without awaiting a responsive pleading, stating:

> "[A] parole revocation hearing is not required until the parole violator warrant has been executed. The parole board is under no obligation to execute the warrant inasmuch as petitioner has been in custody on his 1971 manslaughter [and murder] sentence[s] since the time the warrant was issued and filed as a detainer against him."[3]

The Court of Appeals affirmed, relying on its earlier holding in *Small* v. *Britton,* 500 F. 2d 299 (CA10 1974), in which that court had held that an incarcerated parolee is deprived of no liberty interest by the lodging of a detainer against him, and is thus entitled to no due process safeguards unless and until the parole violator warrant is actually executed.

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not be released from custody until the jurisdiction asserting a parole violation has had an opportunity to act—in this case by taking the inmate into custody or by making a parole revocation determination. When two autonomous jurisdictions are involved, as for example when a federal detainer is placed against an inmate of a state institution, a detainer is a matter of comity.

[3] Civ. Action No. 75-28-C3 (Kan., Jan. 29, 1975).

(2)

The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*, was enacted shortly after we granted certiorari. The Act renamed the Board the Parole Commission and made other changes in federal parole procedures, principally to codify the Board's existing practices.[4] Throughout the progress of this case below, however, parole revocation procedures were controlled by the former statutes, 18 U. S. C. §§ 4205 and 4207.[5] Under them, and the Board's own regulations, 28 CFR § 2.53 (1975),[6] it was the Board's practice to issue a parole violator warrant as a matter of course whenever a federal parolee was convicted of a new offense. Under the former statute and regulations, if the subsequent sentence called for incarceration the warrant was lodged at the institution of confinement as a detainer, for possible later service. A parolee so confined was then notified of the issuance of the unserved warrant and given the opportunity to make a written response. Upon receipt of the response the Board was authorized, in its discretion, to conduct a dispositional interview designed to get the facts relevant to its revocation decision. The parolee could retain counsel for the interview and call witnesses. In lieu of an interview, the Board in its discretion could review the parolee's case based on the record and the written response.

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[4] The Commission's newly promulgated rule, 28 CFR § 2.57 (1976), validates any order of the Board entered prior to May 14, 1976 (the Act's effective date).

[5] Title 18 U. S. C. § 4205 provided:

"A warrant for the retaking of any United States prisoner who has violated his parole may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve."

Title 18 U. S. C. § 4207 provided:

"A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.

"The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.

"If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced."

[6] "(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional

After review—or interview—the Board had three options for disposing of its parole violator warrant:

(a) It could execute the warrant immediately and take the parolee into custody. If parole was revoked at that

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Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

"(b) Following the dispositional review the Regional Director may:

"(1) Let the detainer stand

"(2) Withdraw the detainer and close the case if the expiration date has passed;

"(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

"(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

"(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration."

stage, the remainder of the parolee's original federal sentence, reinstated by the parole revocation, would run concurrently with the subsequent sentence from the time of execution of the warrant. 18 U. S. C. § 4205. Execution of the warrant deprived the parolee of any good-time credits he might have previously earned on his original sentence under 18 U. S. C. § 4161, and of credit for the time spent while on parole. 18 U. S. C. § 4205; 28 CFR § 2.51 (1975).

(b) The Board's second option was to dismiss the warrant and detainer altogether, which operated as a decision not to revoke parole, and under which the parolee retained both his good-time credit and credit for the time spent on parole. Presumably dismissal of the warrant would reflect a Board decision that the violation of conditions of parole was not of such gravity as to justify revocation.

(c) Third, the Board was free to defer a final decision on parole revocation until expiration of the subsequent sentence, as it elected to do in this case; under this third option, the Board was authorized to execute the warrant, take the parolee into custody immediately upon his release, and then conduct a revocation hearing. Deferral of decision while permitting the warrant to stand unexecuted would operate to allow the original sentence to remain in the status it occupied at the time of the asserted parole violation, 18 U. S. C. § 4205; it would not deprive the parolee either of his good time or of the time spent on parole.

Respondent represents that the Board's general practice, before passage of the 1976 Act, was to defer decision in order to have before it the parolee's institutional record during his confinement on the subsequent offense. That record would obviously be highly relevant to the parole revocation decision. Annual reviews of the status of every parolee to whom it had not granted a dispositional interview were conducted under the former statute.

The 1976 Act and accompanying regulations, 28 CFR § 2.1

*et seq.* (1976), incorporate the former procedures with few modifications. Under current law, the Parole Commission reviews the parole violator warrant within 180 days of its issuance, 18 U. S. C. § 4214 (b)(1) (1976 ed.); the parolee, after notification of the impending review, is now entitled to assistance of appointed counsel, if requested, in preparing his written response. 18 U. S. C. § 4214 (a)(2)(B) (1976 ed.). The 1976 Act also abolishes the annual status review formerly required. Previously it was general practice to defer execution of the warrant to completion of the subsequent sentence. It is now firm Commission policy that unless "substantial mitigating circumstances" are shown, the parole violator term of a parolee convicted of crime is to run consecutively to the sentence imposed for the subsequent offense. 28 CFR § 2.47 (c) (1976).

Petitioner asserts protected liberty interests in both the length and conditions of his confinement. Those interests, he argues, are disregarded in several respects by issuance against him of an unexecuted parole violator warrant, which bars him from serving his 1962 rape conviction sentence concurrently with his 1971 homicide sentences, retards his parole eligibility on the later convictions, and adversely affects his prison classification status. He argues that lack of a prompt hearing risks the loss of evidence in mitigation which might induce the Board not to revoke his parole. Respondent's position is that whatever process may eventually be due petitioner, the mere issuance of a parole violator warrant works no present deprivation of protected liberty sufficient to invoke due process protection.

### (3)

In *Morrissey,* we held that the conditional freedom of a parolee generated by statute is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment which may not be terminated absent appropriate due process safeguards. The revocation hearing mandated by *Morrissey*[7] is bottomed on the parallel interests of society and the parolee in establishing whether a parole violation has occurred and, if so, whether under all the circumstances the quality of that violation calls for parole revocation. The issue before us here, however, is not whether a *Morrissey*-type hearing will ever be constitutionally required in the present case,[8] but whether a hearing must be held at the present time, before the parolee is taken into custody as a parole violator. We hold that there is no requirement for an immediate hearing.

Petitioner's present confinement and consequent liberty loss derive not in any sense from the outstanding parole violator warrant, but from his two 1971 homicide convictions. Issuance of the warrant and notice of that fact to the institution of confinement did no more than express the Board's intent to defer consideration of parole revocation to a later time.

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[7] In the present case, where petitioner has already been convicted of and incarcerated on a subsequent offense, there is no need for the preliminary hearing which *Morrissey* requires upon arrest for a parole violation. This is so both because the subsequent conviction obviously gives the parole authority "probable cause or reasonable ground to believe that the . . . parolee has committed acts that would constitute a violation of parole conditions," 408 U. S., at 485, and because issuance of the warrant does not immediately deprive the parolee of liberty. The 1976 Act calls for no preliminary hearing in such cases. 18 U. S. C. § 4214 (b)(1) (1976 ed.); see 28 CFR § 2.48 (f) (1976).

[8] Congress has provided a statutory right to a parole revocation hearing along *Morrissey* lines even where the parolee "knowingly and intelligently admits violation" of the terms of his parole, or has been convicted of a crime committed while on parole and is therefore barred from relitigating facts constituting a parole violation. 18 U. S. C. §§ 4214 (c), (d) (1976 ed.); see *Morrissey, supra,* at 490. At the hearing the parolee may present evidence addressed to whether, given his admitted violation, circumstances exist justifying his continued release on parole. 28 CFR § 2.50 (1976). Petitioner will be entitled to this statutory hearing within 90 days after execution of the warrant. 18 U. S. C. § 4214 (c) (1976 ed).

Though the gravity of petitioner's subsequent crimes places him under a cloud, issuance of the warrant was not a determination that petitioner's parole under his 1962 rape conviction will be revoked; the time at which the Commission must make that decision has not yet arrived. With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which *Morrissey* sought to protect. Indeed, in holding that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody," *Morrissey*, 408 U. S., at 488, we established execution of the warrant and custody under that warrant as the operative event triggering any loss of liberty attendant upon parole revocation. This is a functional designation, for the loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant. Cf. 18 U. S. C. § 4206; 18 U. S. C. § 4213 (d) (1976 ed.).

The other injuries petitioner claims to suffer either do not involve a loss of protected liberty or have not occurred by reason of the warrant and detainer. His real complaint is that he desires to serve his sentence for the 1962 rape conviction concurrently with his sentences for two 1971 homicides. But, as we have noted, even after completion of the homicide sentences the Commission retains full discretion to dismiss the warrant or decide, after hearing, that petitioner's parole need not be revoked. If revocation is chosen, the Commission has power to grant, retroactively, the equivalent of concurrent sentences and to provide for unconditional or conditional release upon completion of the subsequent sentence. See 18 U. S. C. §§ 4211, 4214 (d) (1976 ed.); 28 CFR §§ 2.21, 2.52 (c)(2) (1976). Thus, deferral of the revocation decision does not deprive petitioner of any such opportunity;

nothing in the statute or regulations gives him any "right" to force the decision of the Commission at this time.[9]

Petitioner also argues that issuance of a parole violator warrant, without more, diminishes his opportunity for parole on his intervening sentence. Assuming for the moment that granting of parole is a protected liberty interest which this warrant impinges, this argument fails to take into account that here the same Commission which will consider petitioner's parole under his 1971 homicide convictions will decide whether to revoke parole granted under the 1962 conviction. The statutory hearing to which petitioner will be entitled upon his application for release on parole will give him the same full opportunity to persuade the Commission that he should be released from federal custody as would an immediate hearing on the parole violator warrant. Whether different issues would be presented by the prospect of adverse action by different and autonomous parole authorities, we need not consider.

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[9] Petitioner further claims that evidence of mitigation may be lost if the revocation hearing is not held promptly, but he makes no claim that there is additional evidence in his case which may be vitiated by a delay. Had such claims been made, the Commission has the power, as did the Board before it, to conduct an immediate hearing at which petitioner can preserve his evidence. 18 U. S. C. § 4214 (b)(2) (1976 ed.); 28 CFR § 2.47 (1976).

Petitioner also argues that the pending warrant and detainer adversely affect his prison classification and qualification for institutional programs. We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right. In *Meachum* v. *Fano,* 427 U. S. 215 (1976), for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where that transfer visited a "grievous loss" upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U. S. C. § 4081, and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.

Finally, there is a practical aspect to consider, for in cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation. This is uniquely a "prediction as to the ability of the individual to live in society without committing antisocial acts." *Morrissey, supra,* at 480. In making this prophecy, a parolee's institutional record can be perhaps one of the most significant factors. Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions, here a double homicide, a decision to revoke parole would often be foreordained. Given the predictive nature of the hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate—at the expiration of the parolee's intervening sentence.

Accordingly, and without regard to what process may be due petitioner before his parole may be finally revoked, we hold that he has been deprived of no constitutionally protected rights simply by issuance of a parole violator warrant. The Commission therefore has no constitutional duty to provide petitioner an adversary parole hearing until he is taken into custody as a parole violator by execution of the warrant.

*Affirmed.*

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court holds that the lodging of a detainer with an institution in which a parolee is confined does not have the kind of impact on his custodial status that requires a due process hearing. That holding does not answer the question which I regard as critical in this case. For it is clear that sooner or later a parole revocation hearing will be held; the question is whether the timing of that hearing is an element of the procedural fairness to which the parolee is constitutionally entitled. I am persuaded that it is.

I start from the premise that parole revocation is a deprivation of liberty within the meaning of the Fifth and Fourteenth Amendments and therefore must be preceded by due process. The Court so held in *Morrissey* v. *Brewer,* 408 U. S. 471, 481–483. In that case the revocation resulted in the return of the parolee to prison whereas in this case the parolee is already incarcerated for a separate offense. But in both situations the revocation affects the length of his confinement and therefore may result in a "grievous loss" of liberty.[1] Accordingly, it is clear—and I do not understand the Court to disagree, see *ante,* at 85–86, 89—that the parolee's constitutional right to have the revocation hearing conducted fairly is not affected by his custodial status.[2] Moreover, since the parole revocation process begins when the Parole Commission issues the revocation warrant,[3] it plainly follows that the constitutional protections afforded the parolee attach at that time. The question, then, is whether the parolee's right to a fair hearing includes any right to have the hearing conducted with reasonable dispatch.

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[1] In *Wolff* v. *McDonnell,* 418 U. S. 539, 558, the Court held that loss of "good-time credits" was a deprivation of liberty which required due process protections because the loss of credits could lengthen confinement.

"We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia,* 129 U. S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Ibid.*

Similarly, as the Seventh Circuit held in *United States ex rel. Miller* v. *Twomey,* 479 F. 2d 701, 715 (1973): "The time when an inmate may enjoy liberty is directly affected by the disallowance of statutory good time. . . . The cancellation of such credits thus inflicts the same kind of 'grievous loss' on the prisoner as does the revocation of parole [citing *Morrissey*]."

[2] The status of the incarcerated parolee is comparable to that of a defendant on trial for one offense who is already imprisoned for another. Cf. *Smith* v. *Hooey,* 393 U. S. 374; *Strunk* v. *United States,* 412 U. S. 434, 439.

It is apparently the position of the Parole Commission that it has no obligation to go forward with the revocation hearing until after the parolee has completed the service of his sentence for the second offense.[4] It may therefore wait as long as 10 or 20 years after commencing the revocation process by issuing a warrant. This position, I submit, can be tenable only if one assumes that the constitutional right to a fair hearing includes no right whatsoever to a prompt hearing. Precedent, tradition, and reason require rejection of that assumption.

In *Klopfer* v. *North Carolina*, 386 U. S. 213, 226, the Court held that the States were required by the Due Process Clause of the Fourteenth Amendment to provide a defendant with a prompt hearing because the right to a speedy trial "is one of the most basic rights preserved by our Constitution." That holding rested in part on common-law tradition of such a fundamental nature as to be reflected in the Magna Carta itself.[5] In that case, Mr. Justice Harlan, though disagreeing with the view that the "speedy trial" provision of the Sixth Amendment was directly applicable to the States, concurred with the conclusion that a state procedure "which in effect allows state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Id.*, at 227.

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[3] The issuance of a parole revocation warrant suspends the running of a convict's sentence and parole until final disposition of the parole violation charges may be made by the Commission. 28 CFR § 2.44 (d) (1976). The issuance of the warrant must be considered the commencement of the parole revocation process, since suspension of the running of a parolee's sentence could not otherwise be justified. Thus, the due process protections, which the Court has held apply to the parole revocation process, *Morrissey*, attach at that time.

[4] The majority suggests that under the prior law, which has governed this case since its filing, the Parole Board if it revoked parole as to a parolee while he was incarcerated on an intervening sentence, would be required to make the service of both sentences concurrent. See *ante*, at 83-84, citing 18 U. S. C. § 4205. I do not read § 4205 as placing such a restriction on the Board's discretion, but even if it did, such a statutory provision does not affect the constitutional question. Moreover, whatever the effect of § 4205, this statute has been overridden by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219. Thus, 18 U. S. C. § 4210 (b)(2) (1976 ed.) now expressly allows the Commission to determine whether the two sentences will be served "concurrently or consecutively."

The common-law tradition that supports both the Court's holding and Mr. Justice Harlan's separate concurrence in

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[5] As the Court noted, 386 U. S., at 224, the Magna Carta as interpreted by Sir Edward Coke guaranteed to all speedy justice.

"In [Coke's] explication of Chapter 29 of the Magna Carta, he wrote that the words 'We will sell to no man, we will not deny or defer to any man either justice or right' had the following effect:

"'And therefore, every subject of this realme, for injury done to him *in bonis, terris, vel persona,* by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.'" Quoting E. Coke, 2 Institutes 55 (Brooke, 5th ed., 1797).

The opinion in *Klopfer*, 386 U. S., at 225–226, n. 21, also notes that the Massachusetts Constitution of 1780, Part I, Art. XI, provided:

"Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

*Klopfer*,[6] also requires respect for a parolee's interest in the reasonably prompt disposition of charges pending against him, regardless of whether or not he is incarcerated.

This Court has already held that present incarceration for one offense does not deprive an inmate of his right to a prompt trial on a second charge. *Smith* v. *Hooey*, 393 U. S. 374; *Strunk* v. *United States*, 412 U. S. 434. Moreover, the Court has made it clear that the constitutional protection applies not only to the determination of guilt but also to the discretionary decision on what disposition should be made of the defendant. This point was squarely decided with respect to parole revocation in *Morrissey* v. *Brewer*.[7] And in *Pollard* v. *United States*, 352 U. S. 354, the Court, though rejecting the particular claim, recognized that a defendant's right to a speedy trial included a right to a prompt sentencing determination. The entire Court subscribed to the view that delay in regard to disposition "must not be purposeful or oppressive." *Id.*, at 361. That view contrasts sharply with the Parole Commission's conscious policy of delaying parole revocation decisions under these circumstances.

Those holdings recognize the defendant's legitimate interest in changing the uncertainty associated with a pending charge into the greater certainty associated with its disposition.[8] In the words of a former director of the Federal

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[6] "To support that conclusion I need only refer to the traditional concepts of due process set forth in the opinion of THE CHIEF JUSTICE." 386 U. S., at 227.

[7] "There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing . . . must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." 408 U. S., at 487–488.

[8] The prisoner also has an interest in disposing of detainers because they may affect the conditions and extent of his custody. "[U]nder procedures now widely practiced, the duration of [a prisoner's] present imprisonment may be increased, and the conditions under which he must

Bureau of Prisons that were quoted by the Court in *Smith*, *supra*, at 379, the "'anxiety and concern'" which accompany unresolved charges have as great an impact on the incarcerated as on those at large.[9]

"[I]t is in their effect upon the prisoner and our attempts

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serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him." *Smith* v. *Hooey*, 393 U. S., at 378.

Moreover, the Court in *Smith* quoted a former director of the Federal Bureau of Prisons as writing:

"'Today the prisoners with detainers are evaluated individually but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner.' Bennett, 'The Last Full Ounce,' 23 Fed. Prob. No. 2, p. 20, at 21 (1959)." *Id.*, at 379 n. 8.

Under present Bureau of Prisons' policy, a detainer will not preclude a more lenient classification of a prisoner, but "the seriousness of a detainer must be considered when custody reductions are considered." Bureau of Prisons, Policy Statement 7300.112 ¶ 4 (Apr. 8, 1976). See also Bureau of Prisons, Policy Statement 7500.72 ¶ 4 (May 8, 1972).

It should be noted that if a prisoner would rather face the uncertainty and restrictions which might occur because of an outstanding detainer in hopes that the Commission would prove more lenient at a later revocation hearing, he could certainly waive his right to a prompt hearing.

[9] The Bureau of Prisons recognizes the detriments created by allowing detainers to remain unexecuted.

"Because uncertainty as to status can have an adverse effect on our efforts to provide offenders with correctional services, we should encourage detaining authorities to dispose of pending untried charges against offenders in federal custody.

"The casework staff at all institutions may cooperate with and give assistance to offenders in their efforts to have detainers against them disposed of, either by having the charges dropped, by restoration to probation, or parole status or by arrangement for concurrent service of the state sentence.

. . . . .

"The presence of a detainer oftentimes has a restricting effect on efforts to involve the offender in correctional programs. For this reason, caseworkers at federal institutions are expected to assist offenders in their

> to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into . . . custody . . . at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement."[10]

Although those comments were directed at the prisoner's right to a prompt trial on a second criminal charge, they are also applicable to the incarcerated parolee's interest in a reasonably prompt revocation hearing.

Under the respondent's position, the petitioner's hearing may come as much as 10 years after his intervening conviction. It is unlikely that such a delayed hearing would focus on the question whether facts in mitigation existed at the time of commission of the intervening offense; rather, the primary inquiry would no doubt be directed at the question whether petitioner made satisfactory institutional progress in the service of his intervening sentence to justify his return to society. That is the sort of inquiry that would in any event be appropriate in a parole *release* hearing. In short, a prolonged delay will inevitably change the character of the revocation hearing. If unlimited delay is permitted, the procedural safeguards which were fashioned in *Morrissey* to assure the parolee a fair opportunity to present facts in mitigation and to challenge the government's assertions will have become meaningless. Delay will therefore violate the "fundamental requirement of due process"—"the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge,* 424 U. S. 319, 333, quoting *Armstrong* v. *Manzo,* 380 U. S. 545, 552.

Petitioner argues that the detainer itself is the source of

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efforts to have detainers disposed of." Bureau of Prisons, Policy Statement 7500.14A (Jan. 7, 1970).

[10] Bennett, The Last Full Ounce, 23 Fed. Prob. No. 2, pp. 20, 21 (1959).

his grievous loss which mandates a hearing. That is not my view. In my judgment the detainer is comparable to an arrest or an indictment which identifies a time when it is clear that the government has a basis for going forward with appropriate proceedings and from which the right to a speedy determination accrues.[11] Since I believe the right to orderly procedure leading to a reasonably prompt decision is a fundamental attribute of due process, I cannot accept the conclusion that the right is vindicated by simply lodging a detainer and letting it remain outstanding for year after year while the prisoner's interest in knowing where he stands may be entirely ignored.[12]

I therefore respectfully dissent.

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[11] By emphasizing the fact that the filing of a warrant starts the parole revocation process, I do not mean to imply that the parolee's right to a prompt revocation hearing should depend upon the filing of a warrant. If the Commission has full notice of a parolee's intervening conviction, it should not be permitted to wait until the termination of the intervening sentence to act. Compare *United States* v. *Marion,* 404 U. S. 307 (holding that due process places some restraints on government delay in bringing an indictment) with *Barker* v. *Wingo,* 407 U. S. 514 (a speedy trial case).

[12] I do not imply that the parole authorities actually discharge their responsibilities in such a heartless manner. But I cannot accept a constitutional holding that would permit them to do so.

I should also make clear that I would not prescribe any inflexible rule that the hearing must always take place within a fixed period. Nor would I require that the prisoner's interest in a reasonably prompt determination of his status always mandate a personal appearance either at the place of his incarceration or at the place where the parole board normally sits. If justification for the revocation is established by a new conviction, there would seldom be need for a hearing on the discretionary aspects of revocation—certainly not unless strong mitigating circumstances were identified. But the fact that the prisoner has only a slight chance of prevailing on the merits does not justify a total rejection of his interest in a prompt disposition. Moreover, if, as respondent contends, delay will sometimes be in the parolee's best interest, the parolee could always waive his right to a prompt hearing.

# ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* GAMBLE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-929. Argued October 5, 1976—Decided November 30, 1976

Respondent state inmate brought this civil rights action under 42 U. S. C. § 1983 against petitioners, the state corrections department medical director (Gray) and two correctional officials, claiming that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of a back injury assertedly sustained while he was engaged in prison work. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals held that the alleged insufficiency of the medical treatment required reinstatement of the complaint. *Held:* Deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment. Here, however, respondent's claims against Gray do not suggest such indifference, the allegations revealing that Gray and other medical personnel saw respondent on 17 occasions during a 3-month span and treated his injury and other problems. The failure to perform an X-ray or to use additional diagnostic techniques does not constitute cruel and unusual punishment but is at most medical malpractice cognizable in the state courts. The question whether respondent has stated a constitutional claim against the other petitioners, the Director of the Department of Corrections and the warden of the prison, was not separately evaluated by the Court of Appeals and should be considered on remand. Pp. 101–108.

516 F. 2d 937, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., concurred in the judgment. STEVENS, J., filed a dissenting opinion, *post*, p. 108.

*Bert W. Pluymen,* Assistant Attorney General of Texas, argued the cause for petitioners *pro hac vice.* With him on the brief were *John L. Hill*, Attorney General, *David M. Kendall*, First Assistant Attorney General, and *Joe B. Dibrell, Jr.*, Assistant Attorney General.

*Daniel K. Hedges*, by appointment of the Court, 425 U. S. 932, argued the cause and filed a brief for respondent *pro hac vice*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent J. W. Gamble, an inmate of the Texas Department of Corrections, was injured on November 9, 1973, while performing a prison work assignment. On February 11, 1974, he instituted this civil rights action under 42 U. S. C. § 1983,[1] complaining of the treatment he received after the injury. Named as defendants were the petitioners, W. J. Estelle, Jr., Director of the Department of Corrections, H. H. Husbands, warden of the prison, and Dr. Ralph Gray, medical director of the Department and chief medical officer of the prison hospital. The District Court, *sua sponte*, dismissed the complaint for failure to state a claim upon which relief could be granted.[2] The Court of Appeals reversed and remanded with instructions to reinstate the complaint. 516 F. 2d 937 (CA5 1975). We granted certiorari, 424 U. S. 907 (1976).

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[1] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] It appears that the petitioner-defendants were not even aware of the suit until it reached the Court of Appeals. Tr. of Oral Arg. 7, 13–15. This probably resulted because the District Court dismissed the complaint simultaneously with granting leave to file it *in forma pauperis*.

## I

Because the complaint was dismissed for failure to state a claim, we must take as true its handwritten, *pro se* allegations. *Cooper* v. *Pate,* 378 U. S. 546 (1964). According to the complaint, Gamble was injured on November 9, 1973, when a bale of cotton[3] fell on him while he was unloading a truck. He continued to work but after four hours he became stiff and was granted a pass to the unit hospital. At the hospital a medical assistant, "Captain" Blunt, checked him for a hernia and sent him back to his cell. Within two hours the pain became so intense that Gamble returned to the hospital where he was given pain pills by an inmate nurse and then was examined by a doctor. The following day, Gamble saw a Dr. Astone who diagnosed the injury as a lower back strain, prescribed Zactirin (a pain reliever) and Robaxin (a muscle relaxant),[4] and placed respondent on "cell-pass, cell-feed" status for two days, allowing him to remain in his cell at all times except for showers. On November 12, Gamble again saw Dr. Astone who continued the medication and cell-pass, cell-feed for another seven days. He also ordered that respondent be moved from an upper to a lower bunk for one week, but the prison authorities did not comply with that directive. The following week, Gamble returned to Dr. Astone. The doctor continued the muscle relaxant but prescribed a new pain reliever, Febridyne, and placed respondent on cell-pass for seven days, permitting him to remain in his cell except for meals and showers. On November 26, respondent again saw Dr. Astone, who put respondent back on the original pain reliever for five days and continued the cell-pass for another week.

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[3] His complaint states that the bale weighed "6.00 pound." The Court of Appeals interpreted this to mean 600 pounds. 516 F. 2d 937, 938 (CA5 1975).

[4] The names and descriptions of the drugs administered to respondent are taken from his complaint. App. A-5—A-11, and his brief, at 19-20.

On December 3, despite Gamble's statement that his back hurt as much as it had the first day, Dr. Astone took him off cell-pass, thereby certifying him to be capable of light work. At the same time, Dr. Astone prescribed Febridyne for seven days. Gamble then went to a Major Muddox and told him that he was in too much pain to work. Muddox had respondent moved to "administrative segregation."[5] On December 5, Gamble was taken before the prison disciplinary committee, apparently because of his refusal to work. When the committee heard his complaint of back pain and high blood pressure, it directed that he be seen by another doctor.

On December 6, respondent saw petitioner Gray, who performed a urinalysis, blood test, and blood pressure measurement. Dr. Gray prescribed the drug Ser-Ap-Es for the high blood pressure and more Febridyne for the back pain. The following week respondent again saw Dr. Gray, who continued the Ser-Ap-Es for an additional 30 days. The prescription was not filled for four days, however, because the staff lost it. Respondent went to the unit hospital twice more in December; both times he was seen by Captain Blunt, who prescribed Tiognolos (described as a muscle relaxant). For all of December, respondent remained in administrative segregation.

In early January, Gamble was told on two occasions that he would be sent to the "farm" if he did not return to work. He refused, nonetheless, claiming to be in too much pain. On January 7, 1974, he requested to go on sick call for his back pain and migraine headaches. After an initial refusal, he saw Captain Blunt who prescribed sodium salicylate (a pain reliever) for seven days and Ser-Ap-Es for 30 days. Respondent returned to Captain Blunt on January 17 and January 25, and received renewals of the pain reliever prescription both times. Throughout the month, respondent was kept in administrative segregation.

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[5] There are a number of terms in the complaint whose meaning is unclear and, with no answer from the State, must remain so. For example, "administrative segregation" is never defined. The Court of Appeals deemed it the equivalent of solitary confinement. 516 F. 2d, at 939. We note, however, that Gamble stated he was in "administrative segregation" when he was in the "32A-7 five building" and "32A20 five building," but when he was in "solitary confinement," he was in "3102 five building."

On January 31, Gamble was brought before the prison disciplinary committee for his refusal to work in early January. He told the committee that he could not work because of his severe back pain and his high blood pressure. Captain Blunt testified that Gamble was in "first class" medical condition. The committee, with no further medical examination or testimony, placed respondent in solitary confinement.

Four days later, on February 4, at 8 a. m., respondent asked to see a doctor for chest pains and "blank outs." It was not until 7:30 that night that a medical assistant examined him and ordered him hospitalized. The following day a Dr. Heaton performed an electrocardiogram; one day later respondent was placed on Quinidine for treatment of irregular cardiac rhythm and moved to administrative segregation. On February 7, respondent again experienced pain in his chest, left arm, and back and asked to see a doctor. The guards refused. He asked again the next day. The guards again refused. Finally, on February 9, he was allowed to see Dr. Heaton, who ordered the Quinidine continued for three more days. On February 11, he swore out his complaint.

## II

The gravamen of respondent's § 1983 complaint is that petitioners have subjected him to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the States by the Fourteenth.[6] See *Robinson* v. *Califor-*

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[6] The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

At oral argument, counsel for respondent agreed that his only claim was based on the Eighth Amendment. Tr. of Oral Arg. 42–43.

*nia*, 370 U. S. 660 (1962). We therefore base our evaluation of respondent's complaint on those Amendments and our decisions interpreting them.

The history of the constitutional prohibition of "cruel and unusual punishments" has been recounted at length in prior opinions of the Court and need not be repeated here. See, *e. g., Gregg* v. *Georgia*, 428 U. S. 153, 169–173 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ. (hereinafter joint opinion)); see also Granucci, Nor Cruel and Unusual Punishment Inflicted: The Original Meaning, 57 Calif. L. Rev. 839 (1969). It suffices to note that the primary concern of the drafters was to proscribe "torture[s]" and other "barbar[ous]" methods of punishment. *Id.*, at 842. Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment. See *Wilkerson* v. *Utah*, 99 U. S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . ."); *In re Kemmler*, 136 U. S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . .").

Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. See, *e. g., Gregg* v. *Georgia, supra*, at 171 (joint opinion); *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958); *Weems* v. *United States*, 217 U. S. 349, 373 (1910). The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ," *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (CA8 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles, supra*, at 101; see also *Gregg* v. *Georgia, supra*, at 172–173 (joint opinion); *Weems* v. *United States, supra*, at 378, or which "involve the unnecessary and wanton infliction of pain," *Gregg* v. *Georgia, supra,* at 173 (joint opinion); see also *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 463 (1947); *Wilkerson* v. *Utah, supra,* at 136.[7]

These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," *In re Kemmler, supra,* the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. Cf. *Gregg* v. *Georgia, supra,* at 182–183 (joint opinion). The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation[8] codifying the common-

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[7] The Amendment also proscribes punishments grossly disproportionate to the severity of the crime, *Gregg* v. *Georgia,* 428 U. S. 153, 173 (1976) (joint opinion); *Weems* v. *United States,* 217 U. S. 349, 367 (1910), and it imposes substantive limits on what can be made criminal and punished, *Robinson* v. *California,* 370 U. S. 660 (1962). Neither of these principles is involved here.

[8] See, *e. g.,* Ala. Code Tit. 45, § 125 (1958); Alaska Stat. § 33.30.050 (1975); Ariz. Rev. Stat. Ann. § 31–201.01 (Supp. 1975); Conn. Gen. Stat. Ann. § 18–7 (1975); Ga. Code Ann. § 77–309 (e) (1973); Idaho Code § 20–209 (Supp. 1976); Ill. Ann. Stat. c. 38, § 103–2 (1970); Ind. Ann. Stat. § 11–1–1.1–30.5 (1973); Kan. Stat. Ann. § 75–5429 (Supp. 1975); Md. Ann. Code Art. 27 § 698 (1976); Mass. Ann. Laws, c. 127, § 90A (1974); Mich. Stat. Ann. § 14.84 (1969); Miss. Code Ann. § 47–1–57 (1972); Mo. Ann. Stat. § 221.120 (1962); Neb. Rev. Stat. § 83–181 (1971); N. H. Rev. Stat. Ann. § 619.9 (1974); N. M. Stat. Ann. § 42–2–4 (1972); Tenn. Code Ann. §§ 41–318, 41–1115, 41–1226 (1975); Utah Code Ann. §§ 64–9–13, 64–9–19, 64–9–20, 64–9–53 (1968); Va. Code Ann. §§ 32–81, 32–82 (1973); W. Va. Code Ann. § 25–1–16 (Supp. 1976); Wyo. Stat. Ann. § 18–299 (1959).

Many States have also adopted regulations which specify, in varying law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[9]

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," *Gregg* v. *Georgia, supra,* at 173 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs[10] or by prison guards in intentionally denying or delaying access to medical

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degrees of detail, the standards of medical care to be provided to prisoners. See Comment, The Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pretrial Detainees, 42 U. Chi. L. Rev. 705, 708–709 (1975).

Model correctional legislation and proposed minimum standards are all in accord. See American Law Institute, Model Penal Code §§ 303.4, 304.5 (1962); National Advisory Commission on Criminal Justice Standards and Goals, Standards on Rights of Offenders, Standard 2.6 (1973); National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners, § 1 (b) (1972); National Sheriffs' Association, Standards for Inmates' Legal Rights, Right No. 3 (1974); Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, Rules 22–26 (1955). The foregoing may all be found in U. S. Dept. of Justice, Law Enforcement Assistance Administration, Compendium of Model Correctional Legislation and Standards (2d ed. 1975).

[9] *Spicer* v. *Williamson,* 191 N. C. 487, 490, 132 S. E. 291, 293 (1926).

[10] See, *e. g., Williams* v. *Vincent,* 508 F. 2d 541 (CA2 1974) (doctor's choosing the "easier and less efficacious treatment" of throwing away the prisoner's ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment"); *Thomas* v. *Pate,* 493 F. 2d 151, 158 (CA7), cert. denied *sub nom. Thomas* v. *Cannon,* 419 U. S. 879 (1974) (injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction); *Jones* v. *Lockhart,* 484 F. 2d 1192 (CA8 1973) (refusal of paramedic to provide treatment); *Martinez* v. *Mancusi,* 443 F. 2d 921 (CA2 1970), cert. denied, 401 U. S. 983 (1971) (prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon).

care[11] or intentionally interfering with the treatment once prescribed.[12] Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain. In *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947), for example, the Court concluded that it was not unconstitutional to force a prisoner to undergo a second effort to electrocute him after a mechanical malfunction had thwarted the first attempt. Writing for the plurality, Mr. Justice Reed reasoned that the second execution would not violate the Eighth Amendment because the first attempt was an "unforeseeable accident." *Id.,* at 464. Mr. Justice Frankfurter's concurrence, based solely on the Due Process Clause of the Fourteenth Amendment, concluded that since the first attempt had failed because of "an innocent misadventure," *id.,* at 470, the second would not be " 'repugnant to the conscience of mankind,' " *id.,* at 471, quoting *Palko* v. *Connecticut,* 302 U. S. 319, 323 (1937).[13]

Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be

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[11] See, *e. g., Westlake* v. *Lucas,* 537 F. 2d 857 (CA6 1976); *Thomas* v. *Pate, supra,* at 158–159; *Fitzke* v. *Shappell,* 468 F. 2d 1072 (CA6 1972); *Hutchens* v. *Alabama,* 466 F. 2d 507 (CA5 1972); *Riley* v. *Rhay,* 407 F. 2d 496 (CA9 1969); *Edwards* v. *Duncan,* 355 F. 2d 993 (CA4 1966); *Hughes* v. *Noble,* 295 F. 2d 495 (CA5 1961).

[12] See, *e. g., Wilbron* v. *Hutto,* 509 F. 2d 621, 622 (CA8 1975); *Campbell* v. *Beto,* 460 F. 2d 765 (CA5 1972); *Martinez* v. *Mancusi, supra; Tolbert* v. *Eyman,* 434 F. 2d 625 (CA9 1970); *Edwards* v. *Duncan, supra.*

[13] He noted, however, that "a series of abortive attempts" or "a single, cruelly willful attempt" would present a different case. 329 U. S., at 471.

"repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.[14]

## III

Against this backdrop, we now consider whether respondent's complaint states a cognizable § 1983 claim. The handwritten *pro se* document is to be liberally construed. As the Court unanimously held in *Haines* v. *Kerner*, 404 U. S. 519 (1972), a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.*, at 520–521, quoting *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957).

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[14] The Courts of Appeals are in essential agreement with this standard. All agree that mere allegations of malpractice do not state a claim, and, while their terminology regarding what is sufficient varies, their results are not inconsistent with the standard of deliberate indifference. See *Page* v. *Sharpe*, 487 F. 2d 567, 569 (CA1 1973); *Williams* v. *Vincent*, *supra*, at 544 (uses the phrase "deliberate indifference"); *Gittlemacker* v. *Prasse*, 428 F. 2d 1, 6 (CA3 1970); *Russell* v. *Sheffer*, 528 F. 2d 318 (CA4 1975); *Newman* v. *Alabama*, 503 F. 2d 1320, 1330 n. 14 (CA5 1974), cert. denied, 421 U. S. 948 (1975) ("callous indifference"); *Westlake* v. *Lucas*, *supra*, at 860 ("deliberate indifference"); *Thomas* v. *Pate*, *supra*, at 158; *Wilbron* v. *Hutto*, *supra*, at 622 ("deliberate indifference"); *Tolbert* v. *Eyman*, *supra*, at 626; *Dewell* v. *Lawson*, 489 F. 2d 877, 881–882 (CA10 1974).

Even applying these liberal standards, however, Gamble's claims against Dr. Gray, both in his capacity as treating physician and as medical director of the Corrections Department, are not cognizable under § 1983. Gamble was seen by medical personnel on 17 occasions spanning a three-month period: by Dr. Astone five times; by Dr. Gray twice; by Dr. Heaton three times; by an unidentified doctor and inmate nurse on the day of the injury; and by medical assistant Blunt six times. They treated his back injury, high blood pressure, and heart problems. Gamble has disclaimed any objection to the treatment provided for his high blood pressure and his heart problem; his complaint is "based solely on the lack of diagnosis and inadequate treatment of his back injury." Response to Pet. for Cert. 4; see also Brief for Respondent 19. The doctors diagnosed his injury as a lower back strain and treated it with bed rest, muscle relaxants, and pain relievers. Respondent contends that more should have been done by way of diagnosis and treatment, and suggests a number of options that were not pursued. *Id.*, at 17, 19. The Court of Appeals agreed, stating: "Certainly an X-ray of [Gamble's] lower back might have been in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing." 516 F. 2d, at 941. But the question whether an X-ray—or additional diagnostic techniques or forms of treatment—is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act.[15] The Court of Appeals was in error in holding that the alleged insufficiency of the medical treatment required reversal and remand. That portion of the judgment of the District Court should have been affirmed.[16]

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[15] Tex. Rev. Civ. Stat., Art. 6252-19, § 3 (Supp. 1976). Petitioners assured the Court at argument that this statute can be used by prisoners to assert malpractice claims. Tr. of Oral Arg. 6.

The Court of Appeals focused primarily on the alleged actions of the doctors, and did not separately consider whether the allegations against the Director of the Department of Corrections, Estelle, and the warden of the prison, Husbands, stated a cause of action. Although we reverse the judgment as to the medical director, we remand the case to the Court of Appeals to allow it an opportunity to consider, in conformity with this opinion, whether a cause of action has been stated against the other prison officials.

*It is so ordered.*

MR. JUSTICE BLACKMUN concurs in the judgment of the Court.

MR. JUSTICE STEVENS, dissenting.

Most of what is said in the Court's opinion is entirely consistent with the way the lower federal courts have been processing claims that the medical treatment of prison inmates is so inadequate as to constitute the cruel and unusual punishment prohibited by the Eighth Amendment. I have no serious disagreement with the way this area of the law has developed thus far, or with the probable impact of this opinion. Nevertheless, there are three reasons why I am unable to join it. First, insofar as the opinion orders the dismissal of the complaint against the chief medical officer of the prison, it is not faithful to the rule normally applied in construing the allegations in a pleading prepared by an uncounseled inmate. Second, it does not adequately explain why the Court granted certiorari in this case. Third, it describes the State's duty to provide adequate medical care to prisoners in ambiguous terms which incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution.

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[16] Contrary to MR. JUSTICE STEVENS' assertion in dissent, this case signals no retreat from *Haines* v. *Kerner*, 404 U. S. 519 (1972). In contrast to the general allegations in *Haines*, Gamble's complaint provides a detailed factual accounting of the treatment he received. By his exhaustive description he renders speculation unnecessary. It is apparent from his complaint that he received extensive medical care and that the doctors were not indifferent to his needs.

## I

The complaint represents a crude attempt to challenge the system of administering medical care in the prison where Gamble is confined. Fairly construed, the complaint alleges that he received a serious disabling back injury in November 1973, that the responsible prison authorities were indifferent to his medical needs, and that as a result of that indifference he has been mistreated and his condition has worsened.

The indifference is allegedly manifested, not merely by the failure or refusal to diagnose and treat his injury properly, but also by the conduct of the prison staff. Gamble was placed in solitary confinement for prolonged periods as punishment for refusing to perform assigned work which he was physically unable to perform.[1] The only medical evidence presented to the disciplinary committee was the statement of a medical assistant that he was in first-class condition, when in fact he was suffering not only from the back sprain but from high blood pressure. Prison guards refused to permit him to sleep in the bunk that a doctor had assigned. On at least one occasion a medical prescription was not filled for four days because it was lost by staff personnel. When he suffered chest pains and blackouts while in solitary, he was forced to wait 12 hours to see a doctor because clearance had to be obtained from the warden. His complaint also draws into question the character of the attention he received from the doctors and the inmate nurse in response to his 17 attempts to obtain proper diagnosis and treatment for his condition. However, apart from the medical director who saw him twice, he has not sued any of the individuals who saw him on these occasions. In short, he complains that the system as a whole is inadequate.

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[1] In his complaint, Gamble alleged that he had been placed in administrative segregation and remained there through December and January. At the end of January he was placed in solitary confinement. In an affidavit filed in the Court of Appeals the following December, see n. 8, *infra*, Gamble alleged that with the exception of one day in which he was taken out of solitary to be brought before the disciplinary committee, he had remained in solitary up to the date of the affidavit.

On the basis of Gamble's handwritten complaint it is impossible to assess the quality of the medical attention he received. As the Court points out, even if what he alleges is true, the doctors may be guilty of nothing more than negligence or malpractice. On the other hand, it is surely not inconceivable that an overworked, undermanned medical staff in a crowded prison[2] is following the expedient course of routinely prescribing nothing more than pain killers when a thorough diagnosis would disclose an obvious need for remedial treatment.[3] Three fine judges

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[2] According to a state legislative report quoted by the Court of Appeals, the Texas Department of Corrections has had at various times one to three doctors to care for 17,000 inmates with occasional part-time help. 516 F. 2d 937, 940–941, n. 1 (1975).

[3] This poorly drafted complaint attempts to describe conditions which resemble those reported in other prison systems. For instance, a study of the Pennsylvania prison system reported:

"When ill, the prisoner's point of contact with a prison's health care program is the sick-call line. Access may be barred by a guard, who refuses to give the convict a hospital pass out of whimsy or prejudice, or in light of a history of undiagnosed complaints. At sick call the convict commonly first sees a civilian paraprofessional or a nurse, who may treat the case with a placebo without actual examination, history-taking or recorded diagnosis. Even seeing the doctor at some prisons produces no sitting on the United States Court of Appeals for the Fifth Circuit[4] thought that enough had been alleged to require some inquiry into the actual facts. If this Court meant what it said in *Haines* v. *Kerner,* 404 U. S. 519, these judges were clearly right.[5]

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more than aspirin for symptoms, such as dizziness and fainting, which have persisted for years." Health Law Project, University of Pennsylvania, Health Care and Conditions in Pennsylvania's State Prisons, in American Bar Association Commission on Correctional Facilities and Services, Medical and Health Care in Jails, Prisons, and Other Correctional Facilities: A Compilation of Standards and Materials 71, 81–82 (Aug. 1974).

A legislative report on California prisons found:

"By far, the area with the greatest problem at the hospital [at one major prison], and perhaps at all the hospitals, was that of the abusive doctor-patient relationship. Although the indifference of M. T. A.s [medical technical assistants] toward medical complaints by inmates is not unique at Folsom, and has been reported continuously elsewhere, the calloused and frequently hostile attitude exhibited by the doctors is uniquely reprehensible. . . .

"Typical complaints against [one doctor] were that he would . . . not adequately diagnose or treat a patient who was a disciplinary problem at the prison . . . ." Assembly Select Committee on Prison Reform and Rehabilitation, An Examination of California's Prison Hospitals, 60–61 (1972).

These statements by responsible observers demonstrate that it is far from fanciful to read a prisoner's complaint as alleging that only *pro forma* treatment was provided.

[4] The panel included Mr. Justice Clark, a retired member of this Court, sitting by designation, and Circuit Judges Goldberg and Ainsworth.

[5] In *Haines* a unanimous Supreme Court admonished the federal judiciary to be especially solicitous of the problems of the uneducated inmate seeking to litigate on his own behalf. The Court said:

"Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of

The *Haines* test is not whether the facts alleged in the complaint would entitle the plaintiff to relief. Rather, it is whether the Court can say with assurance on the basis of the complaint that, beyond any doubt, *no* set of facts could be proved that would entitle the plaintiff to relief.[6] The reasons for the *Haines* test are manifest. A *pro se* complaint provides an unsatisfactory foundation for deciding the merits of important questions because typically it is inartfully drawn, unclear, and equivocal, and because thorough pleadings, affidavits, and possibly an evidentiary hearing will usually bring out facts which simplify or make unnecessary the decision of questions presented by the naked complaint.[7]

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his claim which would entitle him to relief.' *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). See *Dioguardi* v. *Durning*, 139 F. 2d 774 (CA2 1944)." 404 U. S., at 520–521.

Under that test the complaint should not have been dismissed without, at the very minimum, requiring some response from the defendants. It appears from the record that although the complaint was filed in February, instead of causing it to be served on the defendants as required by Fed. Rule Civ. Proc. 4, the Clerk of the District Court referred it to a magistrate who decided in June that the case should be dismissed before any of the normal procedures were even commenced. At least one Circuit has held that dismissal without service on the defendants is improper, *Nichols* v. *Schubert*, 499 F. 2d 946 (CA7 1974). The Court's disposition of this case should not be taken as an endorsement of this practice since the question was not raised by the parties.

[6] This is the test actually applied in *Haines*, for although the Court ordered the complaint reinstated, it expressly "intimate[d] no view whatever on the merits of petitioner's allegations," 404 U. S., at 521. It is significant that the Court took this approach despite being pressed by the State to decide the merits. As in this case, the State argued forcefully that the facts alleged in the complaint did not amount to a constitutional violation. (Only in one footnote in its 51-page brief did the State discuss the pleading question, Brief for Respondents 22–23, n. 20, in No. 70–5025, O. T. 1971.) Yet, this Court devoted not a single word of its opinion to answering the argument that no constitutional violation was alleged.

[7] Thus, *Haines* teaches that the decision on the merits of the complaint

Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this "is another instance of judicial haste which in the long run makes waste," *Dioguardi* v. *Durning*, 139 F. 2d 774, 775 (CA2 1944) (Clark, J.), cited with approval in *Haines* v. *Kerner*, *supra*, at 521. In the instant case, if the District Court had resisted the temptation of premature dismissal, the case might long since have ended with the filing of medical records or affidavits demonstrating adequate treatment. Likewise, if the decision of the Fifth Circuit reinstating the complaint had been allowed to stand and the case had run its normal course, the litigation probably would have come to an end without the need for review by this Court. Even if the Fifth Circuit had wrongly decided the pleading issue, no great harm would have been done by requiring the State to produce its medical records and move for summary judgment. Instead, the case has been prolonged by two stages of appellate review, and is still not over: The case against two of the defendants may still proceed, and even the

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should normally be postponed until the facts have been ascertained. The same approach was taken in *Polk Co.* v. *Glover*, 305 U. S. 5, in which the Court reversed the dismissal of a complaint, without intimating any view of the constitutional issues, on "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions . . . ." *Id.*, at 10. See also *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 213 (Cardozo and Stone, JJ., concurring in result). This approach potentially avoids the necessity of ever deciding the constitutional issue since the facts as proved may remove any constitutional question. Alternatively, a more concrete record will be available on which to decide the constitutional issues. See generally *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 574–575. Even when constitutional principles are not involved, it is important that "the conceptual legal theories be explored and assayed in the light of actual facts, not as a pleader's supposition," so that courts may avoid "elucidating legal responsibilities as to facts which may never be." *Shull* v. *Pilot Life Ins. Co.*, 313 F. 2d 445, 447 (CA5 1963).

claims against the prison doctors have not been disposed of with finality.[8]

The principal beneficiaries of today's decision will not be federal judges, very little of whose time will be saved, but rather the "writ-writers" within the prison walls, whose semiprofessional services will be in greater demand. I have no doubt about the ability of such a semiprofessional to embellish this pleading with conclusory allegations which could be made in all good faith and which would foreclose a dismissal without any response from the State. It is unfortunate that today's decision will increase prisoners' dependence on those writ-writers. See *Cruz* v. *Beto*, 405 U. S. 319, 327 n. 7 (REHNQUIST, J., dissenting).

## II

Like the District Court's decision to dismiss the complaint, this Court's decision to hear this case, in violation of its normal practice of denying interlocutory review, see

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[8] In an affidavit filed in the Court of Appeals, Gamble states that he has been transferred to another prison, placed in solitary confinement, and denied any medical care at all. These conditions allegedly were continuing on December 3, 1974, the date of the affidavit. The Court of Appeals apparently considered these allegations, as shown by a reference to "the fact that [Gamble] has spent months in solitary confinement without medical care and stands a good chance of remaining that way without intervention," 516 F. 2d, at 941. Presumably the Court's remand does not bar Gamble from pursuing these charges, if necessary through filing a new complaint or formal amendment of the present complaint. The original complaint also alleged that prison officials failed to comply with a doctor's order to move Gamble to a lower bunk, that they put him in solitary confinement when he claimed to be physically unable to work, and that they refused to allow him to see a doctor for two days while he was in solitary. Gamble's medical condition is relevant to all these allegations. It is therefore probable that the medical records will be produced and that testimony will be elicited about Gamble's medical care. If the evidence should show that he in fact sustained a serious injury and received only *pro forma* care, he would surely be allowed to amend his pleading to reassert a claim against one or more of the prison doctors.

R. Stern & E. Gressman, Supreme Court Practice 180 (4th ed. 1969), ill serves the interest of judicial economy.

Frankly, I was, and still am, puzzled by the Court's decision to grant certiorari.[9] If the Court merely thought the Fifth Circuit misapplied *Haines* v. *Kerner* by reading the complaint too liberally, the grant of certiorari is inexplicable. On the other hand, if the Court thought that instead of a pleading question, the case presented an important constitutional question about the State's duty to provide medical care to prisoners, the crude allegations of this complaint do not provide the kind of factual basis[10] the Court normally requires as a predicate for the adjudication of a novel and serious constitutional issue, see, *e. g., Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–575; *Ellis* v. *Dixon,* 349 U. S. 458, 464; *Wainwright* v. *City of New Orleans,* 392 U. S. 598 (Harlan, J., concurring).[11] Moreover, as the Court notes, all the Courts of Appeals to consider the question have reached substantially the same conclusion that the Court adopts. *Ante,* at 106 n. 14. Since the Court seldom takes a case merely to reaffirm settled law, I fail to understand why it has chosen to make this case an exception to its normal practice.

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[9] "The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the respondent. Why certiorari was granted is a mystery to me—particularly at a time when the Court is thought by many to be burdened by too heavy a caseload." *Butz* v. *Glover Livestock Comm'n Co.,* 411 U. S. 182, 189 (STEWART, J., dissenting).

[10] As this Court notes, *ante,* at 100 n. 5, even the meaning of some of the terms used in the complaint is unclear.

[11] If this was the reason for granting certiorari, the writ should have been dismissed as improvidently granted when it became clear at oral argument that the parties agreed on the constitutional standard and disagreed only as to its application to the allegations of this particular complaint. See Tr. of Oral Arg. 38, 48.

## III

By its reference to the accidental character of the first unsuccessful attempt to electrocute the prisoner in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, see *ante*, at 105, and by its repeated references to "deliberate indifference" and the "intentional" denial of adequate medical care, I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted.[12] Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.[13] Whether the conditions in Andersonville were the

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[12] As the four dissenting Justices in *Resweber* pointed out:

"The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure." 329 U. S., at 477 (Burton, J., joined by Douglas, Murphy, and Rutledge, JJ.).

[13] The Court indicates the Eighth Amendment is violated "by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Ante*, at 104–105. If this is meant to indicate that intent is a necessary part of an Eighth Amendment violation, I disagree. If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have an affirmative duty to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime.

Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim. But when the State adds to this risk, as by providing a physician who product of design, negligence, or mere poverty, they were cruel and inhuman.

In sum, I remain convinced that the petition for certiorari should have been denied. It having been granted, I would affirm the judgment of the Court of Appeals.

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does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the State's constitutional duty.

# BELCHER *v.* STENGEL ET AL.

### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-823. Argued November 2, 1976—Decided November 30, 1976

Writ of certiorari is dismissed as improvidently granted, where after briefing and oral argument, it appears that the question framed in the petition is not in fact presented by the record.

Certiorari dismissed. Reported below: 522 F. 2d 438.

*Robert A. Bell* argued the cause for petitioner. With him on the brief were *John L. Francis* and *Patrick M. McGrath.*

*John H. Lewis* argued the cause and filed a brief for respondents.*

PER CURIAM.

This case grew out of a barroom affray in Columbus, Ohio, in the course of which the petitioner, an off-duty Columbus police officer, shot and killed two people and permanently disabled a third. The injured victim and the representatives of the deceased victims, who are the respondents here, brought an action against the petitioner in a Federal District Court under 42 U. S. C. § 1983.[1] A jury awarded them monetary

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**Solicitor General Bork, Assistant Attorney General Pottinger,* and *Walter W. Barnett* filed a brief for the United States as *amicus curiae* urging affirmance.

*Michael E. Geltner, Melvin L. Wulf, Joel M. Gora, Stanley K. Laughlin,* and *Nelson G. Karl* filed a brief for the American Civil Liberties Union et al. as *amici curiae.*

[1] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

damages, and the judgment based upon that verdict was affirmed by the United States Court of Appeals for the Sixth Circuit. 522 F. 2d 438.

The petition for certiorari, which we granted on April 5, 1976, 425 U. S. 910, presented a single question:

> "Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, [is] an act 'under color of law' within the meaning of 42 U. S. C. § 1983?"[2]

The case having now been fully briefed and orally argued, it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us. For in addition to the said police department regulation, there was evidence before the jury that showed: (1) The petitioner had been awarded workmen's compensation benefits for the injuries he had received in the affray, on the ground that the injuries had been incurred in the course of his employment; (2) the petitioner, after the affray, had been granted official leave on account of injuries received "in line of duty under circumstances relating to Police duties"; (3) a Board of Inquiry convened to investigate the barroom episode had determined that the petitioner's "actions were in the line of duty."

Now that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered, we have concluded that the writ should be dismissed as improvidently granted. See *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183–184 (1959).

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[2] At no time during this litigation has the petitioner questioned the respondents' claim that, if the petitioner was acting "under color of law," there was a deprivation of the respondents' "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of 42 U. S. C. § 1983.

*It is so ordered.*

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court. I note, however, several additional factors which came to light during plenary consideration of the case and which were not disclosed in the petition for certiorari. The three factors mentioned by the Court, *ante*, at 119, as tending to prove that the police officer acted in the course of his duties, are determinations made *after* the incident in question. There are, however, at least three contemporaneous factors, in addition to possession of the gun, which colored the officer's conduct as official: (1) The officer testified that he had formed an intention that he would arrest at least two of the men when he stood up to intervene in the altercation; (2) he intervened by using a can of mace issued to him by the police department; (3) he was acting pursuant to a police regulation which required his intervention in any disturbance of the peace, whether he was on or off duty.

These factors seem to me important because of the possible negative inference otherwise created that the only objective fact at the time of the incident evidencing state action was the presence of the state-required gun. While, of course, subsequent determinations by state officials, such as mentioned by the Court, are important evidence of state action, they could not transform something into state action that otherwise would be deemed to be private conduct. Thus, it is unclear what the result would have been had the only contemporaneous evidence of state action been the presence of the state-required gun. I wish to make it clear that the Court is not passing on that question today, because it is not presented by the record in this case.

# UNITED STATES *v.* KOPP

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75-1536. Decided December 6, 1976

Double jeopardy does not bar the Government's appeal from the District Court's dismissal of an indictment occurring after that court's general finding of guilt in a bench trial.

Certiorari granted; vacated and remanded.

PER CURIAM.

The operative facts herein are substantially identical to those in *United States* v. *Morrison, ante,* p. 1, and *United States* v. *Rose, ante,* p. 5. Respondent's car was stopped by Border Patrol agents; a search disclosed marihuana. Respondent lost a motion to suppress and was found guilty after a bench trial. Following this trial, but before sentencing, the District Court, relying upon our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), dismissed the indictment. The Court of Appeals for the Tenth Circuit, as it did in *Morrison* and *Rose,* found the Government's appeal barred by double jeopardy.

In *United States* v. *Wilson,* 420 U. S. 332 (1975), we held that double jeopardy would not bar a Government appeal if success on that appeal would result in the reinstatement of a verdict of guilty. The fact that the dismissal of the indictment here occurred after a general finding of guilt rendered by the court in a bench trial, rather than after a return of a verdict of guilty by a jury, is immaterial. *Morrison, supra.* Double jeopardy therefore does not bar an appeal by the Government.

We grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand to that court for proceedings consistent herewith.

# DAVIS *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 76-5403. Decided December 6, 1976

Petitioner's death sentence for murder cannot be carried out where one prospective juror was excluded from the jury for cause for merely expressing scruples against the death penalty, rather than being irrevocably committed to vote against it. *Witherspoon* v. *Illinois,* 391 U. S. 510.

Certiorari granted; 236 Ga. 804, 225 S. E. 2d 241, reversed and remanded.

PER CURIAM.

The petitioner in this case was convicted of murder and sentenced to death after trial by a jury selected in violation of the standards enunciated in *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968), and applied in *Boulden* v. *Holman,* 394 U. S. 478 (1969), and *Maxwell* v. *Bishop,* 398 U. S. 262 (1970). The *Witherspoon* case held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522.

The Supreme Court of Georgia found that one prospective juror had been excluded in violation of the *Witherspoon* standard. The court nevertheless affirmed the conviction and death sentence, reasoning that the erroneous exclusion of one death-scrupled juror did not deny the petitioner a jury representing a cross section of the community since other jurors sharing that attitude were not excused for cause: "The rationale of Witherspoon and its progeny is not violated where merely *one* of a qualified class or group is excluded where it is shown, as here, that others of such group were qualified to serve. This record is completely void of any evidence of a systematic and intentional exclusion of a qualified group of jurors so as to deny the appellant a jury of veniremen representing a cross section of the community." 236 Ga. 804, 809–810, 225 S. E. 2d 241, 244–245.

That, however, is not the test established in *Witherspoon*, and it is not the test that this Court has applied in subsequent cases where a death penalty was imposed after the improper exclusion of one member of the venire. See *Wigglesworth* v. *Ohio,* 403 U. S. 947 (1971), rev'g 18 Ohio St. 2d 171, 248 N. E. 2d 607 (1969); *Harris* v. *Texas,* 403 U. S. 947 (1971), rev'g 457 S. W. 2d 903 (Tex. Crim. App. 1970); *Adams* v. *Washington,* 403 U. S. 947 (1971), rev'g 76 Wash. 2d 650, 458 P. 2d 558 (1969). Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," 391 U. S., at 522 n. 21, he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

As is clear from the most cursory reading, *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968), does not inexorably lead to the result this Court now reaches. Indeed, much of the language in that opinion would support the reasoning, and the result, reached by the Supreme Court of Georgia. The extension of *Witherspoon* to cover the case where a sole venireman is excluded in violation of its test deserves plenary consideration, not a *per se* rule that precludes application of even the harmless-error test of *Chapman* v. *California*, 386 U. S. 18 (1967). There is no indication that the Supreme Court of Georgia was wrong when it observed that the "record is completely void of any evidence of a systematic and intentional exclusion of a qualified group of jurors so as to deny the appellant a jury of veniremen representing a cross section of the community," 236 Ga. 804, 809–810, 225 S. E. 2d 241, 245.

It is, moreover, unclear whether the State was entitled to another peremptory challenge,* and surely *Witherspoon* does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen. Finally, the defect in this case is not that a juror was improperly excluded because she was not irrevocably opposed to the death penalty; rather, the defect is a failure to question sufficiently to determine whether or not she was irrevocably opposed. It is not inconceivable that a hearing with the excluded juror could be conducted now to finish the aborted questioning and determine whether she would have, in fact, been excludable for cause.

The effects of the arguably improper exclusion, in short, are too murky to warrant summary reversal of the sentence imposed. Since I do not believe this case is controlled by our past decisions, I would grant certiorari and set the case for argument.

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*Normally, the defense, in a capital case, is entitled to 20 peremptory challenges, and the State is entitled to one-half as many as the defense. Ga. Code Ann. § 59–805 (1965). In this case, the transcript reveals that the defense utilized 21 peremptory challenges; the State, 10.

Syllabus

# GENERAL ELECTRIC CO. *v.* GILBERT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1589. Argued January 19-20, 1976—Reargued October 13, 1976—Decided December 7, 1976*

This class action was brought by respondents challenging as violative of Title VII of the Civil Rights Act of 1964 the disability plan of petitioner. Under the plan petitioner provides nonoccupational sickness and accident benefits to all its employees, but disabilities arising from pregnancy are excluded. The District Court following trial held that the exclusion constituted sex discrimination in violation of Title VII. The Court of Appeals affirmed, finding that the intervening decision in *Geduldig* v. *Aiello,* 417 U. S. 484, wherein this Court held that disparity in treatment between pregnancy-related and other disabilities was not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment, was not applicable in a Title VII context. Under § 703 (a)(1) of that Title it is an unlawful employment practice for an employer to discriminate against any individual with respect to compensation because of that individual's sex. *Held:* Petitioner's disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities. Pp. 133-146.

(a) The plan, which is strikingly similar to the one in *Geduldig,* "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." 417 U. S., at 496-497, n. 20. Since it is a finding of sex-based discrimination that in a case like this must trigger the finding of an unlawful employment practice under § 703 (a) (1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan like petitioner's providing general coverage is not a gender-based discrimination at all. Pp. 133-136.

(b) There was no more showing here than there was in *Geduldig* that

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*Together with No. 74-1590, *Gilbert et al.* v. *General Electric Co.,* also on certiorari to the same court. See *post,* at 127 n. 1.

the exclusion of pregnancy disability benefits from petitioner's plan was a pretext for discriminating against women, since pregnancy, though confined to women, is in other ways significantly different from the typical covered disease or disability. P. 136.

(c) Gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive. Petitioner's plan is no more than an insurance package covering some risks but excluding others and there has been no showing that the selection of included risks creates a gender-based discriminatory effect. Pp. 136–140.

(d) A 1972 guideline of the Equal Employment Opportunity Commission (EEOC) relied upon by respondents, not only conflicts with earlier EEOC pronouncements but is at odds with the consistent interpretation of the Wage and Hour Administrator with respect to § 703 (h) of Title VII, as amended by the Equal Pay Act, and the legislative history of Title VII, both of which support the "plain meaning" of the language used by Congress when it enacted § 703 (a)(1). Pp. 140–145.

519 F. 2d 661, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined, and in which BLACKMUN, J., joined in part. STEWART, J., filed a concurring statement, *post*, p. 146. BLACKMUN, J., filed a statement concurring in part, *post*, p. 146. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 146. STEVENS, J., filed a dissenting opinion, *post*, p. 160.

*Theophil C. Kammholz* reargued the cause for petitioner.† With him on the briefs were *Stanley R. Strauss, John S. Battle, Jr.,* and *J. Robert Brame III.*

*Ruth Weyand* reargued the cause for respondents.† With her on the briefs were *Winn Newman* and *Seymour DuBow.*

*Assistant Attorney General Pottinger* argued the cause for the United States et al. on reargument as *amici curiae* urging affirmance. With him on the brief were *Solicitor General Bork, Brian K. Landsberg, Walter W. Barnett, Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg,* and *Linda Colvard Dorian.*‡

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†See *post,* at 127 n. 1.

‡Briefs of *amici curiae* urging reversal were filed by *Gordon Dean Booth, Jr.,* for Alaska Airlines, Inc., et al.; by *Edward Silver,*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, General Electric Co.,[1] provides for all of its employees a disability plan which pays weekly nonoccupational sickness and accident benefits. Excluded from the plan's coverage, however, are disabilities arising from pregnancy. Respondents, on behalf of a class of women employees, brought this action seeking, *inter alia*,[2] a declara-

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*Larry M. Lavinsky, Stephen E. Tisman, Sara S. Portnoy,* and *Manuel M. Gorman* for American Life Insurance Assn. et al.; by *Joseph T. King* for the American Society for Personnel Administration; by *Thompson Powers* for the American Telephone & Telegraph Co.; by *Thornton H. Brooks* for Celanese Corp.; by *Gerard C. Smetana, Jerry Kronenberg, Julian D. Schreiber, Lawrence B. Kraus,* and *Richard B. Berman* for the Chamber of Commerce of the United States; by *Kalvin M. Grove, Lawrence M. Cohen, Jeffrey S. Goldman, Robert A. Penney,* and *Clem R. Kyle* for Liberty Mutual Insurance Co.; by *Richard D. Godown* for the National Association of Manufacturers of the United States; by *Lloyd Sutter* for Owens-Illinois, Inc., et al.; and by *John G. Wayman, Scott F. Zimmerman,* and *Walter P. DeForest* for Westinghouse Electric Corp.

Briefs of *amici curiae* urging affirmance were filed by *William J. Brown,* Attorney General, and *Earl M. Manz,* Assistant Attorney General, for the State of Ohio; by *J. Albert Woll, Laurence Gold, Stephen I. Schlossberg,* and *John Fillion* for the American Federation of Labor and Congress of Industrial Organizations et al.; and by *Mary K. O'Melveny, Jonathan W. Lubell, H. Howard Ostrin,* and *Charles V. Koons* for Communications Workers of America, AFL-CIO.

Briefs of *amici curiae* were filed by *Robert G. McClintock* for the School District of the City of Ladue, and by *Thomas I. Emerson, Ruth Bader Ginsberg,* and *Melvin L. Wulf* for Women's Law Project et al.

[1] All the parties to the suit joined in petitioning for a writ of certiorari. General Electric was the moving party before the Court of Appeals, where the judgment of the District Court was affirmed. The parties have agreed that General Electric is to be deemed the petitioner for purposes of briefing and oral argument, a convention we adopt for the writing of this opinion.

[2] Respondents also represent a class of women employees who have been denied such benefits since September 14, 1971, and seek damages arising from this denial.

tion that this exclusion constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* The District Court for the Eastern District of Virginia, following a trial on the merits, held that the exclusion of such pregnancy-related disability benefits from General Electric's employee disability plan violated Title VII, 375 F. Supp. 367. The Court of Appeals affirmed, 519 F. 2d 661, and we granted certiorari, 423 U. S. 822. We now reverse.

## I

As part of its total compensation package, General Electric provides nonoccupational sickness and accident benefits to all employees under its Weekly Sickness and Accident Insurance Plan (Plan) in an amount equal to 60% of an employee's normal straight-time weekly earnings. These payments are paid to employees who become totally disabled as a result of a nonoccupational sickness or accident. Benefit payments normally start with the eighth day of an employee's total disability (although if an employee is earlier confined to a hospital as a bed patient, benefit payments will start immediately), and continue up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related causes.[3]

The individual named respondents are present or former hourly paid production employees at General Electric's plant in Salem, Va. Each of these employees was pregnant during

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[3] With respect to the Plan, General Electric is, in effect, a self-insurer. While General Electric has obtained, for employees outside California, an insurance policy from the Metropolitan Life Insurance Co., this policy involves the payment of a tentative premium only, subject to adjustment in the light of actual experience. Pretrial Stipulation of Facts, ¶ 11, App. 175–176. In effect, therefore, the Metropolitan Life Insurance Co. is used to provide the administrative service of processing claims, while General Electric remains, for all practical purposes, a self-insurer.

1971 or 1972, while employed by General Electric, and each presented a claim to the company for disability benefits under the Plan to cover the period while absent from work as a result of the pregnancy. These claims were routinely denied on the ground that the Plan did not provide disability-benefit payments for any absence due to pregnancy.[4] Each of the respondents thereafter filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that the refusal of General Electric to pay disability benefits under the Plan for time lost due to pregnancy and childbirth discriminated against her because of sex. Upon waiting the requisite number of days, the instant action was commenced in the District Court.[5] The complaint asserted a violation of Title VII. Damages were sought as well as an injunction directing General Electric to include pregnancy disabilities within the Plan on the same terms and conditions as other nonoccupational disabilities.

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[4] Additionally, benefit payment coverage under the Plan for all disabilities, whether or not related to pregnancy, terminates "on the date you cease active work because of total disability or pregnancy, except that if you are entitled to Weekly Benefits for a disability existing on such date of cessation" benefit payments will be continued in accordance with the provisions of the Plan. In cases of personal leave, layoff, or strike, however, the coverage for future nonoccupational sickness or accident disability is continued for 31 days, *ibid.*

In the case of respondent Emma Furch, who took a pregnancy leave on April 7, 1972, and who was hospitalized with a non-pregnancy-related pulmonary embolism on April 21, 1972, a claim was filed for disability benefits under the Plan solely for the period of absence due to the pulmonary embolism. The claim was rejected "since such benefits have been discontinued in accordance with the provisions of the General Electric Insurance Plan."

[5] Plaintiffs in the action were seven female employees; the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE); and the latter's affiliate, Local 161, which is a joint collective-bargaining representative, with the IUE, of the hourly paid production and maintenance employees at General Electric's Salem, Va., plant.

Following trial, the District Court made findings of fact and conclusions of law, and entered an order in which it determined that General Electric, by excluding pregnancy disabilities from the coverage of the Plan, had engaged in sex discrimination in violation of § 703 (a)(1) of Title VII, 42 U. S. C. § 2000e-2 (a)(1). The District Court found that normal pregnancy, while not necessarily either a "disease" or an "accident," was disabling for a period of six to eight weeks;[6] that approximately "[t]en per cent of pregnancies are terminated by miscarriage, which is disabling";[7] and that approximately 10% of pregnancies are complicated by diseases which may lead to additional disability.[8] The District Court noted the evidence introduced during the trial, a good deal of it stipulated, concerning the relative cost to General Electric of providing benefits under the Plan to male and female employees,[9] all of which indicated that, with pregnancy-related disabilities excluded, the cost of the Plan to General Electric per female employee was at least as high as, if not substantially higher than, the cost per male employee.[10]

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[6] The District Court made the following "specific findings":

"1. While pregnancy is perhaps most often voluntary, a substantial incidence of negligent or accidental conception also occurs.

"2. Pregnancy, *per se*, is not a disease.

"3. A pregnancy without complications is normally disabling for a period of six to eight weeks, which time includes the period from labor and delivery, or slightly before, through several weeks of recuperation." 375 F. Supp. 367, 377.

[7] *Ibid.*

[8] "Five percent of pregnancies are complicated by diseases which are found in nonpregnant persons but which may have been stimulated by pregnancy. Five percent of pregnancies are complicated by pregnancy-related diseases. These complications are diseases which may lead to disability." *Ibid.*

[9] The District Court included in its opinion the following charts from a stipulation dated July 24, 1973:

"143. During 1970, GE's experience, by sex, with respect to claims under

[*Footnote 10 is on p. 131*]

The District Court found that the inclusion of pregnancy-related disabilities within the scope of the Plan would "increase G. E.'s [disability benefits plan] costs by an amount which, though large, is at this time undeterminable." 375 F. Supp., at 378. The District Court declined to find that the present actuarial value of the coverage was equal as between men and women,[11] but went on to decide that even

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its weekly sickness and accident disability insurance coverage was as follows:

| | Male | Female |
|---|---|---|
| No. of claims (new) | 19,045 | 15,509 |
| Average duration of claim | 48 days | 52 days |
| No. of new claims per thousand employees | 77 | 173 |
| Average No. of employees covered | 246,492 | 89,705 |
| Total benefits paid | $11,279,110 | $7,405,790 |
| Average cost per insured employee of total benefits paid | $45.76 | $82.57 |

"144. During 1971, GE's experience, by sex, with respect to claims under its weekly sickness and accident disability insurance coverage was as follows:

| | Male | Female |
|---|---|---|
| No. of claims (new) | 22,987 | 17,719 |
| Average duration of claim | 47 days | 52 days |
| No. of new claims per thousand employees | 99 | 217 |
| Average No. of employees covered | 231,026 | 81,469 |
| Total benefits paid | $14,343,000 | $9,191,195 |
| Average cost per insured employee of total benefits paid | $62.08 | $112.91" |

*Ibid.*

[10] At trial, General Electric introduced, in addition to the material cited in n. 9, *supra,* the testimony of Paul Jackson, an actuary, who calculated that the Plan presently "costs 170% more for females than males . . . ." *Id.,* at 378.

[11] "The present plan is objectionable in that it excludes from coverage a unique disability which affects only members of the female sex, while no suggestion is made to exclude disabilities which can be said to affect only males. Additionally, the Court gives no weight to the suggestion that the actuarial value of the coverage now provided is equalized as

had it found economic equivalence, such a finding would not in any case have justified the exclusion of pregnancy-related disabilities from an otherwise comprehensive nonoccupational sickness and accident disability plan. Regardless of whether the cost of including such benefits might make the Plan more costly for women than for men, the District Court determined that "[i]f Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense." *Id.*, at 383.

The ultimate conclusion of the District Court was that petitioner had discriminated on the basis of sex in the operation of its disability program in violation of Title VII, *id.*, at 385–386. An order was entered enjoining petitioner from continuing to exclude pregnancy-related disabilities from the coverage of the Plan, and providing for the future award of monetary relief to individual members of the class affected. Petitioner appealed to the Court of Appeals for the Fourth Circuit, and that court by a divided vote affirmed the judgment of the District Court.

Between the date on which the District Court's judgment was rendered and the time this case was decided by the Court of Appeals, we decided *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), where we rejected a claim that a very similar disability program established under California law violated the Equal Protection Clause of the Fourteenth Amendment because that plan's exclusion of pregnancy disabilities represented sex discrimination. The majority of the Court of Appeals felt that *Geduldig* was not controlling because it

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between men and women. Defenses must be bottomed on evidence, and such, in this regard, is lacking here.

"Whatever inferences may be suggested by the statistical data presented, the Court simply cannot presume to draw any precise conclusions as to the actuarial value of the coverage provided under the present plan, or the effect of including pregnancy related disabilities on the basis of that limited data." *Id.*, at 382–383.

arose under the Equal Protection Clause of the Fourteenth Amendment, and not under Title VII, 519 F. 2d, at 666–667. The dissenting opinion disagreed with the majority as to the impact of *Geduldig*, 519 F. 2d, at 668–669. We granted certiorari to consider this important issue in the construction of Title VII.[12]

## II

Section 703 (a)(1) provides in relevant part that it shall be an unlawful employment practice for an employer

> "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U. S. C. § 2000e–2 (a)(1).

While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term "discrimination," which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII. We think, therefore, that our decision in *Geduldig* v. *Aiello*, *supra*, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex. In *Geduldig*, the disability insurance system was funded entirely from contributions deducted from the wages of participating employees, at a rate of 1% of the employee's salary up to an annual maximum of $85. In other relevant respects, the operation of the program was similar to General Electric's disability benefits plan, see 417 U. S., at 487–489.

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[12] As noted, *supra*, at 127 n. 1, this is a joint petition. Respondents have presented several additional questions, not all of which merit treatment in this opinion. We have concluded that they are all without merit.

We rejected appellee's equal protection challenge to this statutory scheme. We first noted:

> "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure." *Id.*, at 494.

This point was emphasized again, when later in the opinion we noted:

> "[T]his case is thus a far cry from cases like *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reason-

> able basis, just as with respect to any other physical condition.
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.,* at 496–497, n. 20.

The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex.

We recognized in *Geduldig,* of course, that the fact that there was no sex-based discrimination as such was not the end of the analysis, should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other," *ibid.* But we noted that no semblance of such a showing had been made:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.,* at 496–497.

Since gender-based discrimination had not been shown to exist either by the terms of the plan or by its effect, there was no need to reach the question of what sort of standard would govern our review had there been such a showing. See *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Reed* v. *Reed,* 404 U. S. 71 (1971).

The Court of Appeals was therefore wrong in concluding that the reasoning of *Geduldig* was not applicable to an action under Title VII. Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under § 703 (a)(1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.

There is no more showing in this case than there was in *Geduldig* that the exclusion of pregnancy benefits is a mere "pretex[t] designed to effect an invidious discrimination against the members of one sex or the other." The Court of Appeals expressed the view that the decision in *Geduldig* had actually turned on whether or not a conceded discrimination was "invidious" but we think that in so doing it misread the quoted language from our opinion. As we noted in that opinion, a distinction which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination. But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a "disease" at all, and is often a voluntarily undertaken and desired condition, 375 F. Supp., at 375, 377. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women. The contrary arguments adopted by the lower courts and expounded by our dissenting Brethren were largely rejected in *Geduldig*.

The instant suit was grounded on Title VII rather than the Equal Protection Clause, and our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington* v. *Davis*, 426 U. S. 229, 246–248 (1976). For example, in the context of a challenge, under the provisions of § 703 (a)(2),[13] to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were "invidiously to discriminate on the basis of racial or other impermissible classification," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703 (a)(1), but cf. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–806 (1973), the respondents have not made the requisite showing of gender-based effects.[14]

As in *Geduldig*, respondents have not attempted to meet the burden of demonstrating a gender-based discriminatory effect resulting from the exclusion of pregnancy-related disabilities from coverage.[15] Whatever the ultimate probative value of the evidence introduced before the District Court on this subject in the instant case, at the very least it tended to illustrate that the selection of risks covered by the Plan did not operate, in fact, to discriminate against women. As in *Geduldig,* we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes," 417 U. S., at 497 n. 20. We need not disturb the findings of the District Court to note that neither is there a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program," *id.,* at 496. The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others, see *id.,* at 494, 496–497.[16] The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.,* at 496–497. As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less

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[13] This subsection provides that it shall be an unlawful employment practice for an employer

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2 (a)(2).

[14] Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975); *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 802. In *Griggs*, the burden placed on the employer "of showing that any given requirement must have a manifest relationship to the employment in question," 401 U. S., at 432, did not arise until discriminatory effect had been shown, *Albemarle*, *supra*, at 425.

[15] Absent a showing of gender-based discrimination, as that term is

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defined in *Geduldig,* or a showing of gender-based effect, there can be no violation of § 703 (a)(1).

[16] That General Electric self-insures does not change the fact that it is, in effect, acting as an insurer, just as the State of California was acting in *Geduldig,* 417 U. S., at 492.

than all-inclusive.[17] For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other.[18] Just as there is no facial gender-based discrimination in that case, so, too, there is none here.

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[17] Absent proof of different values, the cost to "insure" against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see n. 18, *infra,* they illogically also suggest that the present scheme does violate Title VII because:

"A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability."

Supplemental Brief for Respondents on Reargument 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount. The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that "greater economic benefit[s]" must be required to be paid to one sex or the other because of their differing roles in "the scheme of human existence."

## III

We are told, however, that this analysis of the congressional purpose underlying Title VII is inconsistent with the guidelines of the EEOC, which, it is asserted, are entitled to "great deference" in the construction of the Act, *Griggs*, 401 U. S., at 433–434; *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring). The guideline upon which respondents rely most heavily was promulgated in 1972, and states in pertinent part:

> "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available

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[18] Respondents tacitly admit that this situation would not violate Title VII. They acknowledge that "GE had no obligation to establish any fringe benefit program," Brief for Respondents 143. Moreover, the difficulty with their contention that General Electric engaged in impermissible sex discrimination is vividly portrayed in their closing suggestion that "[i]f paying for pregnancy discriminates within the sphere of classification by sex, so does the failure to pay," Response of Respondents to Reply Brief for Petitioner on Reargument 7. As that statement, and its converse, indicate, perceiving the issue in terms of "sex discrimination" quickly places resolution of this issue into a no-win situation. See also Supplemental Brief for Respondents on Reargument 59 ("[W]e believe that imposing on employees either unequal costs when benefits are equal or unequal benefits when costs are equal violates the right of each individual employee to be treated equally with each individual employee of the opposite sex . . ."). Troublesome interpretative problems such as this reinforce our belief that Congress, in prohibiting sex-based discrimination in Title VII, did not intend to depart from the longstanding meaning of "discrimination," cf. *Jefferson* v. *Hackney*, 406 U. S. 535, 548–549 (1972).

> in connection with employment. . . . [Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10 (b) (1975).[19]

In evaluating this contention it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 431 (1975).[20] This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent, see *Albemarle, supra; Griggs* v. *Duke Power Co., supra,* at 433-434; *Espinoza* v. *Farah Mfg. Co.,* 414 U. S. 86, 94 (1973). But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, see *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484 (1942), or to regulations which under the enabling statute may themselves supply the basis for imposition of liability, see, *e. g.,* § 23 (a), Securities Exchange Act of 1934, 15 U. S. C. § 78w (a). The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944), where the Court said:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not

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[19] The other regulation cited by respondents, 29 CFR § 1604.9 (b) (1975), simply restates the statutory proposition that it is an unlawful employment practice to discriminate "between men and women with regard to fringe benefits."

[20] The EEOC has been given "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter," § 713 (a), 42 U. S. C. § 2000e-12 (a). No one contends, however, that the above-quoted regulation is procedural in nature or in effect.

> controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute. An opinion letter by the General Counsel of the EEOC, dated October 17, 1966, states:

> "You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> "In a recent opinion letter regarding pregnancy, we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII." App. 721–722.

A few weeks later, in an opinion letter expressly issued pursuant to 29 CFR § 1601.30 (1975), the EEOC's position was that "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory," App. 735.

We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837, 858-859, n. 25 (1975); *Espinoza* v. *Farah Mfg. Co., supra,* at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore, supra.*

There are also persuasive indications that the more recent EEOC guideline sharply conflicts with other indicia of the proper interpretation of the sex-discrimination provisions of Title VII. The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity. Even so, however, Congress paid especial attention to the provisions of the Equal Pay Act, 29 U. S. C. § 206 (d),[21] when it amended § 703 (h) of Title VII by adding the following sentence:

> "It shall not be an unlawful employment practice under

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[21] Section 6 (d)(1) of the Equal Pay Act, 29 U. S. C. § 206 (d)(1), provides, in pertinent part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."

> this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29." 42 U. S. C. § 2000e–2 (h).

This sentence was proposed as the Bennett Amendment to the Senate bill, 110 Cong. Rec. 13647 (1964), and Senator Humphrey, the floor manager of the bill, stated that the purpose of the amendment was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law," *id.*, at 13663–13664. Because of this amendment, interpretations of § 6 (d) of the Equal Pay Act are applicable to Title VII as well, and an interpretive regulation promulgated by the Wage and Hour Administrator under the Equal Pay Act explicitly states:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6 (d), if the resulting benefits are equal for such employees." 29 CFR § 800.116 (d) (1975).

Thus, even if we were to depend for our construction of the critical language of Title VII solely on the basis of "deference" to interpretative regulations by the appropriate administrative agencies, we would find ourselves pointed in diametrically opposite directions by the conflicting regulations of the EEOC, on the one hand, and the Wage and Hour Administrator, on the other. Petitioner's exclusion of benefits for pregnancy disability would be declared an unlawful employment practice under § 703 (a)(1), but would be declared not to be an unlawful employment practice under § 703 (h).

We are not reduced to such total abdication in construing the statute. The EEOC guideline of 1972, conflicting as it does with earlier pronouncements of that agency, and containing no suggestion that some new source of legislative history had been discovered in the intervening eight years, stands virtually alone. Contrary to it are the consistent interpretation of the Wage and Hour Administrator, and the quoted language of Senator Humphrey, the floor manager of Title VII in the Senate. They support what seems to us to be the "plain meaning" of the language used by Congress when it enacted § 703 (a)(1).

The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . . ," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant, cf. *Morton* v. *Mancari*, 417 U. S. 535, 549 (1974); *Ozawa* v. *United States*, 260 U. S. 178, 193 (1922). There is surely no reason for any such inference here, see *Gemsco* v. *Walling*, 324 U. S. 244, 260 (1945).

We therefore agree with petitioner that its disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities. The judgment of the Court of Appeals is

*Reversed.*

MR. JUSTICE STEWART, concurring.

I join the opinion of the Court holding that General Electric's exclusion of benefits for disability during pregnancy is not a *per se* violation of § 703 (a)(1) of Title VII, and that the respondents have failed to prove a discriminatory effect. Unlike my Brother BLACKMUN, I do not understand the opinion to question either *Griggs* v. *Duke Power Co.,* 401 U. S. 424, specifically, or the significance generally of proving a discriminatory effect in a Title VII case.

MR. JUSTICE BLACKMUN, concurring in part.

I join the judgment of the Court and concur in its opinion insofar as it holds (a) that General Electric's exclusion of disability due to pregnancy is not, *per se,* a violation of § 703 (a)(1) of Title VII; (b) that the plaintiffs in this case therefore had at least the burden of proving discriminatory effect; and (c) that they failed in that proof. I do not join any inference or suggestion in the Court's opinion—if any such inference or suggestion is there—that effect may never be a controlling factor in a Title VII case, or that *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971), is no longer good law.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court holds today that without violating Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.,* a private employer may adopt a disability plan that compensates employees for all temporary disabilities except one affecting exclusively women, pregnancy. I respectfully dissent. Today's holding not only repudiates the applicable administrative guideline promulgated by the agency charged by Congress with implementation of the Act, but also rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question. See *Communications Workers* v. *American Tel. & Tel.*, 513 F. 2d 1024 (CA2 1975), cert. pending, No. 74–1601; *Wetzel* v. *Liberty Mut. Ins. Co.*, 511 F. 2d 199 (CA3 1975), vacated on jurisdictional grounds, 424 U. S. 737 (1976); *Gilbert* v. *General Electric Co.*, 519 F. 2d 661 (CA4 1975) (this case); *Tyler* v. *Vickery*, 517 F. 2d 1089, 1097–1099 (CA5 1975); *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850 (CA6 1975), cert. pending, No. 75–536; *Hutchison* v. *Lake Oswego School Dist. No. 7*, 519 F. 2d 961 (CA9 1975), cert. pending, No. 75–1049.

## I

This case is unusual in that it presents a question the resolution of which at first glance turns largely upon the conceptual framework chosen to identify and describe the operational features of the challenged disability program. By directing their focus upon the risks excluded from the otherwise comprehensive program, and upon the purported justifications for such exclusions, the Equal Employment Opportunity Commission, the women plaintiffs, and the lower courts reason that the pregnancy exclusion constitutes a prima facie violation of Title VII. This violation is triggered, they argue, because the omission of pregnancy from the program has the intent and effect of providing that "only women [are subjected] to a substantial risk of total loss of income because of temporary medical disability." Brief for EEOC as *Amicus Curiae* 12.

The Court's framework is diametrically different. It views General Electric's plan as representing a gender-free assignment of risks in accordance with normal actuarial techniques. From this perspective the lone exclusion of pregnancy is not a violation of Title VII insofar as all other disabilities are mutually covered for both sexes. This reasoning relies primarily upon the descriptive statement borrowed from

*Geduldig* v. *Aiello,* 417 U. S. 484, 496–497 (1974): "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Ante,* at 138. According to the Court, this assertedly neutral sorting process precludes the pregnancy omission from constituting a violation of Title VII.

Presumably, it is not self-evident that either conceptual framework is more appropriate than the other, which can only mean that further inquiry is necessary to select the more accurate and realistic analytical approach. At the outset, the soundness of the Court's underlying assumption that the plan is the untainted product of a gender-neutral risk-assignment process can be examined against the historical backdrop of General Electric's employment practices and the existence or nonexistence of gender-free policies governing the inclusion of compensable risks. Secondly, the resulting pattern of risks insured by General Electric can then be evaluated in terms of the broad social objectives promoted by Title VII. I believe that the first inquiry compels the conclusion that the Court's assumption that General Electric engaged in a gender-neutral risk-assignment process is purely fanciful. The second demonstrates that the EEOC's interpretation that the exclusion of pregnancy from a disability insurance plan is incompatible with the overall objectives of Title VII has been unjustifiably rejected.

## II

*Geduldig* v. *Aiello, supra,* purports to be the starting point for the Court's analysis. There a state-operated disability insurance system containing a pregnancy exclusion was held not to violate the Equal Protection Clause. Although it quotes primarily from one footnote of that opinion at some length, *ante,* at 134–135, the Court finally does not grapple with *Geduldig* on its own terms.

Considered most favorably to the Court's view, *Geduldig* established the proposition that a pregnancy classification standing alone cannot be said to fall into the category of classifications that rest explicitly on "gender as such," 417 U. S., at 496 n. 20. Beyond that, *Geduldig* offers little analysis helpful to decision of this case. Surely it offends common sense to suggest, *ante,* at 136, that a classification revolving around pregnancy is not, at the minimum, strongly "sex related." See, *e. g., Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, 652 (1974) (POWELL, J., concurring). Indeed, even in the insurance context where neutral actuarial principles were found to have provided a legitimate and independent input into the decisionmaking process, *Geduldig*'s outcome was qualified by the explicit reservation of a case where it could be demonstrated that a pregnancy-centered differentiation is used as a "mere pretext . . . designed to effect an invidious discrimination against the members of one sex. . . ." 417 U. S., at 496–497, n. 20.

Thus, *Geduldig* itself obliges the Court to determine whether the exclusion of a sex-linked disability from the universe of compensable disabilities was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women's role in the labor force. In *Geduldig,* that inquiry coupled with the normal presumption favoring legislative action satisfied the Court that the pregnancy exclusion in fact was prompted by California's legitimate fiscal concerns, and therefore that California did not deny equal protection in effectuating reforms "'one step at a time.'" *Id.,* at 495. But the record in this case makes such deference impossible here. Instead, in reaching its conclusion that a showing of purposeful discrimination has not been made, *ante,* at 136, the Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed.[1] Moreover, the Court studiously ignores the undisturbed conclusion of the District Court that General Electric's "discriminatory attitude" toward women was "a motivating factor in its policy," 375 F. Supp. 367, 383 (ED Va. 1974), and that the pregnancy exclusion was "neutral [neither] on its face" nor "in its intent." *Id.*, at 382.[2]

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[1] General Electric's disability program was developed in an earlier era when women openly were presumed to play only a minor and temporary

Plainly then, the Court's appraisal of General Electric's policy as a neutral process of sorting risks and "not a gender-based discrimination at all," *ante*, at 136, cannot easily be squared with the historical record in this case. The Court,

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role in the labor force. As originally conceived in 1926, General Electric offered no benefit plan to its female employees because " 'women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company.' " App. 958, excerpted from D. Loth, Swope of G. E.: Story of Gerard Swope and General Electric in American Business (1958). It was not until the 1930's and 1940's that the company made female employees eligible to participate in the disability program. In common with general business practice, however, General Electric continued to pursue a policy of taking pregnancy and other factors into account in order to scale women's wages at two-thirds the level of men's. *Id.*, at 1002. More recent company policies reflect common stereotypes concerning the potentialities of pregnant women, see, *e. g.*, *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 644 (1974), and have coupled forced maternity leave with the nonpayment of disability payments. Thus, the District Court found: "In certain instances it appears that the pregnant employee was required to take leave of her position three months prior to birth and not permitted to return until six weeks after the birth. In other instances the periods varied . . . . In short, of all the employees it is only pregnant women who have been required to cease work regardless of their desire and physical ability to work and only they have been required to remain off their job for an arbitrary period after the birth of their child." 375 F. Supp. 367, 385. In February 1973, approximately coinciding with commencement of this suit, the company abandoned its forced-maternity-leave policy by formal directive.

[2] The Court of Appeals did not affirm on the basis of this finding, since it concluded that "the statute looks to 'consequences,' not intent," and "[a]ny discrimination, such as that here, which is 'inextricably sex-linked' in consequences and result is violative of the Act." 519 F. 2d 661, 664.

therefore, proceeds to a discussion of purported neutral criteria that suffice to explain the lone exclusion of pregnancy from the program. The Court argues that pregnancy is not "comparable" to other disabilities since it is a "voluntary" condition rather than a "disease." *Ibid.* The fallacy of this argument is that even if "non-voluntariness" and "disease" are to be construed as the operational criteria for inclusion of a disability in General Electric's program, application of these criteria is inconsistent with the Court's gender-neutral interpretation of the company's policy.

For example, the characterization of pregnancy as "voluntary" [3] is not a persuasive factor, for as the Court of Appeals correctly noted, "other than for childbirth disability, [General Electric] had never construed its plan as eliminating *all* so-called 'voluntary' disabilities," including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery. 519 F. 2d, at 665. Similarly, the label "disease" rather than "disability" cannot be deemed determinative since General Electric's pregnancy disqualification also excludes the 10% of pregnancies that end in debilitating miscarriages, 375 F. Supp., at 377, the 10% of cases where pregnancies are complicated by "diseases" in the intuitive sense of the word, *ibid.*, and cases where women recovering from childbirth are stricken by severe diseases unrelated to pregnancy.[4]

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[3] Of course, even the proposition that pregnancy is a voluntary condition is overbroad, for the District Court found that "a substantial incidence of negligent or accidental conception also occurs." 375 F. Supp., at 377. I may assume, however, for purposes of this argument, that the high incidence of voluntary pregnancies and the inability to differentiate between voluntary and involuntary conceptions, except perhaps through obnoxious, intrusive means, could justify the decision-maker's treating pregnancies as voluntarily induced.

[4] The experience of one of the class plaintiffs is instructive of the reach of the pregnancy exclusion. On April 5, 1972, she took a pregnancy leave, delivering a stillborn baby some nine days later. Upon her return

Moreover, even the Court's principal argument for the plan's supposed gender neutrality cannot withstand analysis. The central analytical framework relied upon to demonstrate the absence of discrimination is the principle described in *Geduldig:* "There is no risk from which men are protected and women are not . . . [and] no risk from which women are protected and men are not." 417 U. S., at 496–497, quoted, *ante,* at 138. In fostering the impression that it is faced with a mere underinclusive assignment of risks in a gender-neutral fashion—that is, all other disabilities are insured irrespective of gender—the Court's analysis proves to be simplistic and misleading. For although all mutually contractible risks are covered irrespective of gender, but see n. 4 *supra,* the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan. Again, pregnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage.[5] Accordingly, the District Court appropriately re-

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home, she suffered a blood clot in the lung, a condition unrelated to her pregnancy, and was rehospitalized. The company declined her claim for disability payments on the ground that pregnancy severed her eligibility under the plan. See *id.*, at 372. Had she been separated from work for any other reason—for example, during a work stoppage—the plan would have fully covered the embolism.

[5] Indeed, the shallowness of the Court's "underinclusive" analysis is transparent. Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage *every* disability that is female-specific or predominantly afflicts women, the Court could still reason as here that the plan operates equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and the other excluded female-dominated disabilities. Along similar lines, any disability that occurs disproportionately in a particular group—sickle-cell anemia, for example—could be freely excluded from the plan without troubling the Court's analytical approach.

marked: "[T]he concern of defendants in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other statistically sex-linked disabilities, buttresses the Court's conclusion that the discriminatory attitude characterized elsewhere in the Court's findings was in fact a motivating factor in its policy." 375 F. Supp., at 383.

If decision of this case, therefore, turns upon acceptance of the Court's view of General Electric's disability plan as a sex-neutral assignment of risks, or plaintiffs' perception of the plan as a sex-conscious process expressive of the secondary status of women in the company's labor force, the history of General Electric's employment practices and the absence of definable gender-neutral sorting criteria under the plan warrant rejection of the Court's view in deference to the plaintiffs'. Indeed, the fact that the Court's frame of reference lends itself to such intentional, sex-laden decisionmaking makes clear the wisdom and propriety of the EEOC's contrary approach to employment disability programs.

## III

Of course, the demonstration of purposeful discrimination is not the only ground for recovery under Title VII. Notwithstanding unexplained and inexplicable implications to the contrary in the majority opinion,[6] this Court, see *Washing-*

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[6] The cryptic "but cf." citation to *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), *ante*, at 137, is perhaps the most mystifying. *McDonnell* involved a private nonclass action under § 703 (a)(1) of Title VII in which the plaintiff explicitly complained that he was discharged from employment for racial, rather than licit, motives. 411 U. S., at 796. In such a case, where questions of motivation openly form the thrust of an individual plaintiff's complaint, the "effects" that company policies may have had on an entire class of persons understandably are only tangentially placed in issue, see *id.*, at 805 n. 19. Even so, the Court expressly held that a prima facie violation of Title VII could be proved without affirmatively demonstrating that purposeful discrimination had occurred. Instead, the Court concluded that such an illicit purpose

*ton* v. *Davis*, 426 U. S. 229, 238–239 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 422 (1975); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971), and every Court of Appeals[7] now have firmly settled that a

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is inferable from the interplay of four factors which together reveal that the employers' policies have worked to disadvantage the complainant vis-à-vis other prospective employees. See *id.*, at 802. Only if the employer then satisfies the burden of articulating "some legitimate, nondiscriminatory reason for the employee's rejection," *ibid.*, must the latter actually seek to establish an intent to discriminate. *Id.*, at 804. Even at this juncture, however, *McDonnell* makes clear that statistical evidence of the racial composition of the labor force—that is, a statistical showing of adverse impact on the protected group of which the individual plaintiff is part—will be persuasive evidence that the failure to rehire the particular complainant "conformed to a general pattern of discrimination against" his group. *Id.*, at 805. Thus, *McDonnell* went far in allowing proof of "effect," even in the setting of an individualized rather than group claim of discrimination.

Equally unacceptable is the implication in the penultimate paragraph of the opinion, *ante*, at 145, that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII. Not only is this fleeting dictum irrelevant to the reasoning that precedes it, not only does it conflict with a long line of cases to the contrary, *infra*, at 153 and this page, but it is flatly contradicted by the central holding of last Term's *Washington* v. *Davis*, 426 U. S. 229, 239 (1976): "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."

[7] See *Boston Chapter, NAACP* v. *Beecher*, 504 F. 2d 1017, 1020 (CA1 1974); *United States* v. *Wood, Wire & Metal Lathers, Local Union 46*, 471 F. 2d 408, 414 n. 11 (CA2 1973); *Pennsylvania* v. *O'Neill*, 473 F. 2d 1029 (CA3 1973) (en banc); *United States* v. *Chesapeake & Ohio R. Co.*, 471 F. 2d 582, 586 (CA4 1972); *United States* v. *Hayes Int'l Corp.*, 456 F. 2d 112, 120 (CA5 1972); *United States* v. *Masonry Contractors Assn. of Memphis, Inc.*, 497 F. 2d 871, 875 (CA6 1974); *United States* v. *Carpenters*, 457 F. 2d 210, 214 (CA7 1972); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 368 (CA8 1973); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 550–551 (CA9 1971); *Muller* v. *United States Steel Corp.*, 509 F. 2d 923, 927 (CA10 1975); *Davis* v. *Washington*, 168 U. S.

prima facie violation of Title VII, whether under § 703 (a)(1) or § 703 (a)(2), also is established by demonstrating that a facially neutral classification has the *effect* of discriminating against members of a defined class.

General Electric's disability program has three divisible sets of effects. First, the plan covers all disabilities that mutually afflict both sexes. But see n. 4, *supra*. Second, the plan insures against all disabilities that are male-specific or have a predominant impact on males. Finally, all female-specific and female-impacted disabilities are covered, except for the most prevalent, pregnancy. The Court focuses on the first factor—the equal inclusion of mutual risks—and therefore understandably can identify no discriminatory effect arising from the plan. In contrast, the EEOC and plaintiffs rely upon the unequal exclusion manifested in effects two and three to pinpoint an adverse impact on women. However one defines the profile of risks protected by General Electric, the determinative question must be whether the social policies and aims to be furthered by Title VII and filtered through the phrase "to discriminate" contained in § 703 (a)(1) fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women but not to men.

As a matter of law and policy, this is a paradigm example of the type of complex economic and social inquiry that Congress wisely left to resolution by the EEOC pursuant to its Title VII mandate. See H. R. Rep. No. 92-238, p. 8 (1972). And, accordingly, prior Title VII decisions have consistently acknowledged the unique persuasiveness of EEOC

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App. D. C. 42, 46, 512 F. 2d 956, 960 (1975), rev'd on constitutional grounds, 426 U. S. 229 (1976).

Indeed, following *Griggs*, Congress in 1972 revised Title VII, and expressly endorsed use of the "effect only" test outlined therein in identifying "increasingly complex" "forms and incidents of discrimination" that "may not appear obvious at first glance." See H. R. Rep. No. 92-238, p. 8 (1972).

interpretations in this area. These prior decisions, rather than providing merely that Commission guidelines are "entitled to consideration," as the Court allows, *ante*, at 141, hold that the EEOC's interpretations should receive "great deference." *Albemarle Paper Co.* v. *Moody*, *supra*, at 431; *Griggs* v. *Duke Power Co.*, *supra*, at 433–434; *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring). Nonetheless, the Court today abandons this standard in order squarely to repudiate the 1972 Commission guideline providing that "[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities . . . [under] any health or temporary disability insurance or sick leave plan . . . ." 29 CFR § 1604.10 (b) (1975). This rejection is attributed to two interrelated events: an 8-year delay between Title VII's enactment and the promulgation of the Commission's guideline, and interim letters by the EEOC's General Counsel expressing the view that pregnancy is not necessarily includable as a compensable disability. Neither event supports the Court's refusal to accord "great deference" to the EEOC's interpretation.

It is true, as noted, *ante*, at 143, that only brief mention of sex discrimination appears in the early legislative history of Title VII. It should not be surprising, therefore, that the EEOC, charged with a fresh and uncharted mandate, candidly acknowledged that further study was required before the contours of sex discrimination as proscribed by Congress could be defined. See 30 Fed. Reg. 14927 (1965). Although proceeding cautiously, the Commission from the outset acknowledged the relationship between sex discrimination and pregnancy, announcing that "policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy." EEOC First Annual Report to Congress, Fiscal Year 1965–1966, p. 40 (1967). During the succeeding seven years, the EEOC worked to develop a coherent policy toward pregnancy-oriented employment practices both through the pursuit of its normal adjudicatory functions[8] and by engaging in comprehensive studies with such organizations as the President's Citizens' Advisory Council on the Status of Women. See, *e. g.*, Address of Jacqueline G. Gutwillig, Chairwoman, Citizens' Advisory Council, cited in App. 1159. These investigations on the role of pregnancy in the labor market coupled with the Commission's "review . . . [of] its case decisions on maternity preparatory to issuing formal guidelines," *id.*, at 1161, culminated in the 1972 guideline, the agency's first formalized, systematic statement on "employment policies relating to pregnancy and childbirth."

Therefore, while some eight years had elapsed prior to the issuance of the 1972 guideline, and earlier opinion letters had refused to impose liability on employers during this period of deliberation, no one can or does deny that the final EEOC determination followed thorough and well-informed consideration. Indeed, realistically viewed, this extended evaluation of an admittedly complex problem and an unwillingness to impose additional, potentially premature costs on employers during the decisionmaking stages ought to be perceived as a practice to be commended. It is bitter irony that the care that preceded promulgation of the 1972 guideline is today condemned by the Court as tardy indecisiveness, its unwillingness irresponsibly to challenge employers' practices during the formative period is labeled as evidence of inconsistency, and this indecisiveness and inconsistency are bootstrapped into reasons for denying the Commission's interpretation its due deference.

For me, the 1972 guideline represents a particularly conscientious and reasonable product of EEOC deliberations and, therefore, merits our "great deference." Certainly, I can find no basis for concluding that the guideline is out of step with congressional intent. See *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86, 94 (1973). On the contrary, prior to 1972, Congress enacted just such a pregnancy-inclusive rule to govern the distribution of benefits for "sickness" under the Railroad Unemployment Insurance Act, 45 U. S. C. § 351 (k)(2). Furthermore, shortly following the announcement of the EEOC's rule, Congress approved and the President signed an essentially identical promulgation by the Department of Health, Education, and Welfare under Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 (a) (1970 ed., Supp. V). See 45 CFR § 86.57 (c) (1976). Moreover, federal workers subject to the jurisdiction of the Civil Service Commission now are eligible for maternity and pregnancy coverage under their sick leave program. See Federal Personnel Manual, ch. 630, subch. 13, S13-2 (FPM Supp. 990-2, May 6, 1975).

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[8] For synopses of the Commission's positions regarding pregnancy and sex discrimination adopted in the course of administrative decisionmaking and litigation activities, see the EEOC's Annual Reports to Congress.

These policy formulations are reasonable responses to the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force. See, *e. g.*, U. S. Dept. of Commerce, Consumer Income (Series P-60, No. 93, July 1974); Women's Bureau, U. S. Dept. of Labor, Underutilization of Women Workers (rev. ed. 1971). In dictating pregnancy coverage under Title VII, the EEOC's guideline merely settled upon a solution now accepted by every other Western industrial country. Dept. of Health, Education, and Welfare, Social Security Programs Throughout the World, 1971, pp. ix, xviii, xix (Research Report No. 40). I find it difficult to comprehend that such a construction can be anything but a "sufficiently reasonable" one to be "accepted by the reviewing courts." *Train* v. *Natural Resources Def. Council*, 421 U. S. 60, 75 (1975).

The Court's belief that the concept of discrimination cannot reach disability policies effecting "an *additional* risk, unique to women . . . ," *ante,* at 139, is plainly out of step with the decision three Terms ago in *Lau* v. *Nichols,* 414 U. S. 563 (1974), interpreting another provision of the Civil Rights Act. There a unanimous Court recognized that discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of "disadvantaged" individuals.[9] A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies. Unlike the hypothetical situations conjectured by the Court, *ante,* at 139–140, and n. 17, contemporary disability programs are not creatures of a social or cultural vacuum devoid of stereotypes and signals concerning the pregnant woman employee. Indeed, no one seriously contends that General Electric or other companies actually conceptualized or developed their comprehensive insurance programs disability-by-disability in a strictly sex-neutral fashion.[10] Instead, the company has devised a policy that, but for pregnancy, offers protection for all risks, even those that are "unique to" men or heavily male dominated. In light of this social experience, the history of General Electric's employment practices, the otherwise all-inclusive design of its disability program, and the burdened role of the contemporary working woman, the EEOC's construction of sex discrimination under § 703 (a)(1) is fully consonant with the ultimate objective of Title VII, "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women]." *McDonnell Douglas Corp.* v. *Green,* 411 U. S., at 800.

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[9] *Lau* held that the failure to provide special language instruction to Chinese-speaking students in San Francisco schools violated the ban against racial or national origin discrimination contained in § 601 of the Civil Rights Act of 1964. The Court concluded that the Act, as interpreted by the administrative regulations promulgated by the Department of Health, Education, and Welfare addressed "*effect*[*s*] [to discriminate] even though no purposeful design is present," and ultimately sought to further the broad goal of insuring "a meaningful opportunity to participate in the [schools'] educational program . . . ." 414 U. S., at 568. Faced with such a generalized objective, the Court repudiated the analysis of the Court of Appeals which had relied upon San Francisco's commitment of equal educational offerings and resources to every child as the basis for concluding that Chinese students have suffered no discrimination due to the failure to adjust the school program to remedy their unique language deficiencies. Instead, the Court agreed that the anti-discrimination language fairly can be read "to require affirmative remedial efforts to give special attention to linguistically deprived children." *Id.,* at 571 (STEWART, J., concurring). Similarly, given the broad social objectives that underlie Title VII, see *infra,* at 160, and General Electric's apparent unhesitancy to take into account the unique physical characteristics of their male workers in defining the breadth of disability coverage, see *supra,* at 152, ample support appears for upholding the EEOC's view that pregnancy must be treated accordingly.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

The word "discriminate" does not appear in the Equal Protection Clause.[1] Since the plaintiffs' burden of proving a prima facie violation of that constitutional provision is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination,[2] the constitutional holding in *Geduldig* v. *Aiello,* 417

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[10] See, *e. g.*, n. 1, *supra.*

[1] The word does, however, appear in a number of statutes, but has by no means been given a uniform interpretation in those statutes. Compare *FTC* v. *Morton Salt Co.,* 334 U. S. 37, 44–45 (1948) (Robinson-Patman Act) with *NLRB* v. *Great Dane Trailers,* 388 U. S. 26, 32–35 (1967) (National Labor Relations Act).

[2] *Washington* v. *Davis,* 426 U. S. 229, 238–248 (1976).

U. S. 484 (1974), does not control the question of statutory interpretation presented by this case. And, of course, when it enacted Title VII of the Civil Rights Act of 1964, Congress could not possibly have relied on language which this Court was to use a decade later in the *Geduldig* opinion.[3] We are, therefore, presented with a fresh, and rather simple, question of statutory construction: Does a contract between a company and its employees which treats the risk of absenteeism caused by pregnancy differently from any other kind of absence discriminate against certain individuals because of their sex?

An affirmative answer to that question would not necessarily lead to a conclusion of illegality, because a statutory affirmative defense might justify the disparate treatment of pregnant women in certain situations. In this case, however, the company has not established any such justification. On the other hand, a negative answer to the threshold question would not necessarily defeat plaintiffs' claim because facially neutral criteria may be illegal if they have a discriminatory effect.[4] An analysis of the effect of a company's rules relating to absenteeism would be appropriate if those rules referred only to neutral criteria, such as whether an absence was voluntary or involuntary, or perhaps particularly costly. This case, however, does not involve rules of that kind.

Rather, the rule at issue places the risk of absence caused by pregnancy in a class by itself.[5] By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. The analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan. Accordingly, without reaching the questions of motive, administrative expertise, and policy, which MR. JUSTICE BRENNAN so persuasively exposes, or the question of effect to which MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN refer, I conclude that the language of the statute plainly requires the result which the Courts of Appeals have reached unanimously.

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[3] Quite clearly Congress could not have intended to adopt this Court's analysis of sex discrimination because it was seven years after the statute was passed that the Court first intimated that the concept of sex discrimination might have some relevance to equal protection analysis. See *Reed* v. *Reed*, 404 U. S. 71 (1971).

[4] *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–432 (1971).

[5] It is not accurate to describe the program as dividing "'potential recipients into two groups—pregnant women and nonpregnant persons.'" *Ante*, at 135. Insurance programs, company policies, and employment contracts all deal with future *risks* rather than historic facts. The classifica-

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tion is between persons who face a risk of pregnancy and those who do not.

Nor is it accurate to state that under the plan "'[t]here is no risk from which men are protected and women are not.'" *Ibid.* If the word "risk" is used narrowly, men are protected against the risks associated with a prostate operation whereas women are not. If the word is used more broadly to describe the risk of uncompensated unemployment caused by physical disability, men receive total protection (subject to the 60% and 26-week limitations) against that risk whereas women receive only partial protection.

# IDAHO EX REL. ANDRUS, GOVERNOR, ET AL. v. OREGON ET AL.

### ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 67, Orig. Argued November 8, 1976—Decided December 7, 1976

Without determining whether the bill of complaint states a claim upon which relief can be granted, Idaho's motion for leave to file a bill of complaint is granted to the extent that the complaint prays that the Court declare Idaho entitled as against Oregon and Washington to an equitable portion of the upriver anadromous fishery of the Columbia River Basin and that the Court determine such portion on the evidence and award costs and incidental relief, but is denied in all other respects.

*Wayne L. Kidwell*, Attorney General of Idaho, argued the cause for plaintiffs. With him on the brief were *Terry E. Coffin*, Deputy Attorney General, and *Matthew J. Mullaney, Jr.*

*Lee Johnson*, Attorney General, argued the cause for defendant State of Oregon. With him on the brief were *W. Michael Gillette*, Solicitor General, and *Raymond P. Underwood*, *Beverly B. Hall*, and *Thomas H. Denney*, Assistant Attorneys General. *Slade Gorton*, Attorney General, argued the cause for defendant State of Washington. With him on the brief was *Edward B. Mackie*, Deputy Attorney General.*

PER CURIAM.

The Court has considered the written submissions of the parties and heard oral argument by the Attorneys General of the States with respect to the motion of the State of Idaho for leave to file a bill of complaint. It having been

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*Briefs of *amici curiae* were filed by *Solicitor General Bork* for the United States; by *Wendell Wyatt* for the Columbia River Fishermens Protective Union; and by *Robert E. Smylie* for the Izaak Walton League of America, Inc., et al.

concluded that the Court has original and exclusive jurisdiction of this case to the extent that the complaint prays that the Court declare that the State of Idaho is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River Basin and that the Court determine Idaho's equitable portion based on the evidence and award costs and appropriate incidental relief, the motion for leave to file is hereby granted to that extent. The motion is in all other respects denied. This order is not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted. This order also leaves open the question of the indispensability of the United States as a party for decision after evidence, in the event the United States does not enter its appearance in the case. The States of Oregon and Washington are directed to file answers to the bill of complaint or to otherwise plead within 60 days and process is ordered to issue accordingly.

*It is so ordered.*

# COOK ET AL. *v.* HUDSON ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-503. Argued November 1, 1976—Decided December 7, 1976

**Certiorari is dismissed, where it appears, upon examination of the merits on oral argument in light of an intervening state statute and the intervening decision in *Runyon* v. *McCrary,* 427 U. S. 160, that the grant of certiorari was improvident.**

Certiorari dismissed. Reported below: 511 F. 2d 744.

*George Colvin Cochran* argued the cause and filed a brief for petitioners.

*Will A. Hickman* argued the cause for respondents. With him on the brief was *S. T. Rayburn.**

PER CURIAM.

Certiorari was granted to consider the question presented: whether, consistently with the First and Fourteenth Amendments, a Mississippi public school board may terminate the employment of teachers sending their children not to public schools, but to a private racially segregated school. However, since the grant of certiorari, *Runyon* v. *McCrary,* 427 U. S. 160 (1976), held that 42 U. S. C. § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes. Moreover, a Mississippi statute, Miss. Code Ann. § 37-9-59 (Supp. 1976), enacted in 1974 after the school board action here complained of, prohibits school boards "from denying employment or reemployment to any person . . . for the single reason that any eligible child of such person

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**Stephen J. Pollak, John Townsend Rich, Franklin D. Kramer,* and *David Rubin* filed a brief for the National Education Assn. as *amicus curiae* urging reversal.

does not attend the school system in which such [person] is employed." Though § 37-9-59 was cited in the record at the time of granting the writ, examination of the merits on oral argument in light of *Runyon* v. *McCrary* and § 37-9-59 satisfies us that the grant was improvident. Accordingly, the writ of certiorari is dismissed as improvidently granted. Cf. *Rice* v. *Sioux City Cemetery,* 349 U. S. 70 (1955).

MR. CHIEF JUSTICE BURGER, concurring in the result.

I join in the Court's disposition of this case. In doing so, I emphasize that our decision to dismiss the writ of certiorari as improvidently granted intimates no view on the question of when, if ever, public school teachers—or any comparable public employees—may be required, as a condition of their employment, to enroll their children in any particular school or refrain from sending them to a school which they, as parents, in their sole discretion, consider desirable. Few familial decisions are as immune from governmental interference as parents' choice of a school for their children, so long as the school chosen otherwise meets the educational standards imposed by the State. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972).

# CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8 ET AL. v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 75-946. Argued October 12, 1976—Decided December 8, 1976

During the course of a regularly scheduled, open meeting of appellant Board of Education, public discussion turned to currently pending labor negotiations between the board and the teachers' union. One speaker was a nonunion teacher who, over union objection, addressed one topic of the pending negotiations, namely, the union's demand for a "fair share" clause, which would require all teachers (whether union members or not) to pay union dues. He read a petition signed by the teachers in the district, calling for postponement of the issue until it could be given closer examination by an impartial committee. Subsequently, after a collective-bargaining agreement had been signed containing all the union's demands except the "fair share" clause, the union filed a complaint with the appellee Wisconsin Employment Relations Commission (WERC), claiming that the board had committed a prohibited labor practice in violation of Wisconsin law by permitting the nonunion teacher to speak at its public meeting because that constituted negotiations by the board with a member of the bargaining unit other than the exclusive collective-bargaining representative. The WERC found the board guilty of the prohibited labor practice and ordered that it immediately cease and desist from permitting any employees but union officials to appear and speak at board meetings on matters subject to collective bargaining. The WERC was upheld on appeal, the Wisconsin Supreme Court concluding that the nonunion teacher's statement before the board constituted "negotiation" with the board, and holding that the abridgment of speech by the WERC was justified in order "to avoid the dangers attendant upon relative chaos in labor management relations." *Held:*

1. The circumstances do not present such danger to labor-management relations as to justify curtailing speech in the manner ordered by the WERC. Pp. 173-176.

(a) Where it does not appear that the nonunion teacher sought to bargain or offered to enter into any bargain with the board or that he was authorized by any other teachers to enter into any agreement on their behalf, there is no basis for concluding that his terse statement during the public meeting constituted negotiation with the board. Although his views were not consistent with those of the union, communicating such views to the employer could not change the fact that the union alone was authorized to negotiate and enter into a contract with the board. P. 174.

(b) Moreover, since the board meeting was open to the public, the nonunion teacher addressed the board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government. Where the board has so opened a forum for direct citizen involvement, it may not exclude teachers who make up the overwhelming proportion of school employees and are most concerned with the proceedings. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, under the First Amendment it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. Pp. 174–176.

2. The WERC's order, being designed to govern speech and conduct in the future and not merely to punish past conduct, is an improper prior restraint on teachers' expressions to the board on matters involving the operation of schools. Pp. 176–177.

69 Wis. 2d 200, 231 N. W. 2d 206, reversed and remanded.

Burger, C. J., delivered the opinion of the Court, in which White, Blackmun, Powell, Rehnquist, and Stevens, JJ., joined. Brennan, J., filed an opinion concurring in the judgment, in which Marshall, J., joined, *post*, p. 177. Stewart, J., filed an opinion concurring in the judgment, *post*, p. 180.

*Gerald C. Kops* argued the cause for appellants. With him on the briefs was *Henry A. Gempeler*.

*Robert C. Kelly* argued the cause for appellee Madison Teachers, Inc. With him on the brief was *William Haus*.*

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*Briefs of *amici curiae* urging reversal were filed by *William W. Van Alstyne* for the American Association of University Professors; by *Robert T. Thompson* and *Lawrence Kraus* for the Chamber of Commerce of the United States; by *James Newton Wilhoit III*, *Rex H. Reed*, and *James K. Ruhly* for the National Right to Work Legal Defense Foundation; by *Sylvester Petro* for the Public Service Research Council; by *John J. Gunther* for the United States Conference of Mayors; and by *James F. Clark* and *Karen A. Mercer* for the Wisconsin Association of School Boards, Inc.

Briefs of *amici curiae* were filed by *J. Albert Woll* and *Laurence Gold*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal from the Supreme Court of Wisconsin is whether a State may constitutionally require that an elected board of education prohibit teachers, other than union representatives, to speak at open meetings, at which public participation is permitted, if such speech is addressed to the subject of pending collective-bargaining negotiations.

The Madison Board of Education and Madison Teachers, Inc. (MTI), a labor union, were parties to a collective-bargaining agreement during the calendar year of 1971.[1] In January 1971 negotiations commenced for renewal of the agreement and MTI submitted a number of proposals. One among them called for the inclusion of a so-called "fair-share" clause, which would require all teachers, whether members of MTI or not, to pay union dues to defray the costs of collective bargaining. Wisconsin law expressly permits inclusion of "fair share" provisions in municipal employee collective-bargaining agreements. Wis. Stat. § 111.70 (2) (1973). Another proposal presented by the union was a provision for binding arbitration of teacher dismissals. Both of these provisions were resisted by the school board. The negotiations deadlocked in November 1971 with a number of issues still unresolved, among them "fair share" and arbitration.

During the same month, two teachers, Holmquist and Reed, who were members of the bargaining unit, but not members of the union, mailed a letter to all teachers in the district

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for the American Federation of Labor and Congress of Industrial Organizations, and by *Robert H. Chanin* and *David Rubin* for the National Education Assn.

[1] MTI had been certified on June 7, 1966, as majority collective-bargaining representative of the teachers in the district by the Wisconsin Employment Relations Commission.

expressing opposition to the "fair share" proposal.[2] Two hundred teachers replied, most commenting favorably on Holmquist and Reed's position. Thereupon a petition was drafted calling for a one-year delay in the implementation of "fair share" while the proposal was more closely analyzed by an impartial committee.[3] The petition was circulated to teachers in the district on December 6, 1971. Holmquist and Reed intended to present the results of their petition effort to the school board and to MTI at the school board's public meeting that same evening.

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[2] The text of the letter was as follows:

"Dear Fellow Madisonian Educator,

"E. C. — O. L. O. G. Y.

"*E*ducator's *C*hoice—*O*bligatory *L*eadership *O*r *G*over[n]ance by *Y*ou

"SAVE FREEDOM OF CHOICE

"A Closed Shop (agency shop) Removes This Freedom

"1. Does an organization which represents the best interests of teachers and pupils NEED mandatory membership deductions?

"2. Need relationships between administrators and teachers be further strained by LEGALLY providing for mandatory adversary camps?

"3. Should minority voices be mandatorily SILENCED?

"4. Could elimination of outside dissent produce NON-RESPONSIVENESS to change?

"5. And . . .
isn't this lack of FREEDOM OF CHOICE undemocratic?

*"SUPPORT FREEDOM OF CHOICE—*
*OPPOSE AGENCY SHOP*

"I wish to maintain freedom of choice:
"I oppose agency shop on principle ________
"I oppose agency shop and would sign a petition stating so ________
"I oppose agency shop and would work actively to maintain freedom of choice ________

"Let us hear from YOU.
"Al Holmquist /s/ E. C. — O. L. O. G. Y.
"Al Holmquist P. O. Box 5184
"Ralph Reed /s/ Madison, WI 53705
"Ralph Reed
"Teacher co-chairmen"

[3] The text of the petition was as follows:

"To: Madison Board of Education December 6, 1971
Madison Teachers, Incorporated

"We the undersigned ask that the fair-share proposal (agency shop)

Because of the stalemate in the negotiations, MTI arranged to have pickets present at the school board meeting. In addition, 300 to 400 teachers attended in support of the union's position. During a portion of the meeting devoted to expression of opinion by the public, the president of MTI took the floor and spoke on the subject of the ongoing negotiations. He concluded his remarks by presenting to the board a petition signed by 1,300–1,400 teachers calling for the expeditious resolution of the negotiations. Holmquist was next given the floor, after John Matthews, the business representative of MTI, unsuccessfully attempted to dissuade him from speaking. Matthews had also spoken to a member of the school board before the meeting and requested that the board refuse to permit Holmquist to speak. Holmquist stated that he represented "an informal committee of 72 teachers in 49 schools" and that he desired to inform the board of education, as he had already informed the union, of the results of an informational survey concerning the "fair share" clause. He then read the petition which had been circulated to the teachers in the district that morning and stated that in the 31 schools from which reports had been received, 53% of the teachers had already signed the petition.

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being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following:

"1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

"2) The findings of this study be made public.

"3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

"4) The results of this written ballot be made public."

Holmquist stated that neither side had adequately addressed the issue of "fair share" and that teachers were confused about the meaning of the proposal. He concluded by saying: "Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation." The sole response from the school board was a question by the president inquiring whether Holmquist intended to present the board with the petition. Holmquist answered that he would. Holmquist's presentation had lasted approximately 2½ minutes.

Later that evening, the board met in executive session and voted a proposal acceding to all of the union's demands with the exception of "fair share." During a negotiating session the following morning, MTI accepted the proposal and a contract was signed on December 14, 1971.

### (1)

In January 1972, MTI filed a complaint with the Wisconsin Employment Relations Commission (WERC) claiming that the board had committed a prohibited labor practice by permitting Holmquist to speak at the December 6 meeting. MTI claimed that in so doing the board had engaged in negotiations with a member of the bargaining unit other than the exclusive collective-bargaining representative, in violation of Wis. Stat. §§ 111.70 (3)(a)1, 4 (1973).[4] Fol-

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[4] The statute provides in relevant part:

"(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

"1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

. . . . .

"4. To refuse to bargain collectively with a representative of a malowing a hearing the Commission concluded that the board was guilty of the prohibited labor practice and ordered that it "immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc." The Commission's action was affirmed by the Circuit Court of Dane County.

The Supreme Court of Wisconsin affirmed. 69 Wis. 2d 200, 231 N. W. 2d 206. The court recognized that both the Federal and State Constitutions protect freedom of speech and the right to petition the government, but noted that these rights may be abridged in the face of " 'a clear and present danger that [the speech] will bring about the substantive evils that [the legislature] has a right to prevent.' " *Id.*, at 211, 231 N. W. 2d, at 212, citing *Schenck* v. *United States*, 249 U. S. 47 (1919). The court held that abridgment of the speech in this case was justified in order "to avoid the dangers attendant upon relative chaos in labor management relations." 69 Wis. 2d, at 212, 231 N. W. 2d, at 213.

(2)

The Wisconsin court perceived "clear and present danger" based upon its conclusion that Holmquist's speech before the school board constituted "negotiation" with the board. Permitting such "negotiation," the court reasoned, would undermine the bargaining exclusivity guaranteed the majority union under Wis. Stat. § 111.70 (3)(a)4 (1973). From that

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jority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement."

premise it concluded that teachers' First Amendment rights could be limited. Assuming, *arguendo,* that such a "danger" might in some circumstances justify some limitation of First Amendment rights, we are unable to read this record as presenting such danger as would justify curtailing speech.

The Wisconsin Supreme Court's conclusion that Holmquist's terse statement during the public meeting constituted negotiation with the board was based upon its adoption of the lower court's determination that, "'[e]ven though Holmquist's statement superficially appears to be merely a "position statement," the court deems from the total circumstances that it constituted "negotiating."'" This cryptic conclusion seems to ignore the ancient wisdom that calling a thing by a name does not make it so.[5] Holmquist did not seek to bargain or offer to enter into any bargain with the board, nor does it appear that he was authorized by any other teachers to enter into any agreement on their behalf. Although his views were not consistent with those of MTI, communicating such views to the employer could not change the fact that MTI alone was authorized to negotiate and to enter into a contract with the board.

Moreover the school board meeting at which Holmquist was permitted to speak was open to the public.[6] He addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government. We have held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968). See also *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings.[7] It is conceded that any citizen could have presented precisely the same points and provided the board with the same information as did Holmquist.

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[5] The determination of the state courts that certain conduct constituted "negotiating" under state law, standing alone, would not ordinarily be open to our review; only its use as a predicate for restraining speech opens it to review here.

[6] This meeting was open to the public pursuant to a Wisconsin statute which requires certain governmental decisionmaking bodies to hold open meetings. Wis. Stat. § 66.77 (1) (1973), now § 19.81 (1) (1976). There are exceptions to the statute, and one of these has been interpreted to cover labor negotiations between a municipality and a labor organization. 54 Op. Atty. Gen. of Wis. vi (1965), cited with approval, *Board of School Directors* v. *Wisconsin Employment Relations Comm'n,* 42 Wis. 2d 637, 653, 168 N. W. 2d 92, 99-100 (1969). Thus, in contrast to the open session where the public was invited, the true bargaining sessions between the union and the board were conducted in private.

Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in public discussion of public business cannot be confined to one category of interested individuals.[8] To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.[9] Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 96 (1972).[10]

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[7] We need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees. It is enough that Holmquist and other teachers and citizens have a protected right to communicate with the board. Since the board's ability to hear them is "inextricably meshed" with the teachers' right to speak, the board may assert those rights on behalf of Holmquist. *Procunier* v. *Martinez*, 416 U. S. 396, 409 (1974).

[8] Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business. See n. 6, *supra*.

(3)

The WERC's order is not limited to a determination that a prohibited labor practice had taken place in the past; it also restrains future conduct. By prohibiting the school board from "permitting employes . . . to appear and speak at meetings of the Board of Education" the order constitutes an indirect, but effective, prohibition on persons such as Holmquist from communicating with their government. The order would have a substantial impact upon virtually all communication between teachers and the school board. The order prohibits speech by teachers "on matters subject to collective bargaining." [11] As the dissenting opinion below noted, however, there is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective bargaining. Teachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district. The Wisconsin court's reliance on *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973), for the proposition that one whose conduct falls squarely within an otherwise valid proscription may not challenge that proscription on grounds of vagueness, is inapposite. The challenged portion of the order is designed to govern speech and conduct in the future, not to punish past conduct, and as such it is the essence of prior restraint.

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[9] The WERC order does not prohibit all speech to the board on the subject of collective bargaining. Union representatives would continue to be entitled to come before the board at its public meetings and make their views known. The impact of such a rule is underscored by the fact that the union need not rely upon public meetings to make its position known to the school board; it can also do so at closed negotiating sessions. See n. 6, *supra.*

[10] Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands.

[11] Counsel for the union conceded at oral argument that the WERC order was constitutionally overbroad, but asked the Court to narrow it

The judgment of the Wisconsin Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

By stating that "the extent to which true contract negotiations . . . may be regulated [is] an issue we need not consider at this time," *ante,* at 175, the Court's opinion treats as open a question the answer to which I think is abundantly

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simply to prohibit the board from negotiating with employees in the bargaining unit. It is not the function of this Court to undertake that task.

On the other hand, it is not the case that Holmquist was speaking "simply as a member of the community." On the contrary, as noted, *supra,* at 171, Holmquist opened his remarks to the board by stating that he represented "an informal committee of 72 teachers in 49 schools." Thus, he appeared and spoke both as an employee and a citizen exercising First Amendment rights.

clear. Wisconsin has adopted, as unquestionably the State constitutionally may adopt, a statutory policy that authorizes public bodies to accord exclusive recognition to representatives for collective bargaining chosen by the majority of an appropriate unit of employees. In that circumstance the First Amendment plainly does not prohibit Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying Holmquist the right to attend and speak at the session. That proposition is implicit in the words of Mr. Justices Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441, 445 (1915). Certainly in the context of Wisconsin's adoption of the exclusivity principle as a matter of state policy governing relations between state bodies and unions of their employees, "[t]here must be a limit to individual argument in such matters if government is to go on." *Ibid.* For the First Amendment does not command "that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida,* 385 U. S. 39, 48 (1966). For example, this Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be closed to the public without implicating any constitutional rights whatever. *Branzburg* v. *Hayes,* 408 U. S. 665, 684 (1972). Thus, the Wisconsin Supreme Court was correct in stating that there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees.

But the First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation.* In such case, the state body has created a public forum dedicated to the expression of views by the general public. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 96 (1972). The order sustained by the Wisconsin Supreme Court obviously contravenes that principle. Although there was a complete absence of any evidence that Holmquist's speech was part of a course of conduct in aid of an unfair labor practice by the board, the order commands that the board "shall immediately cease and desist from permitting employes, other than [union] representatives . . . to appear and speak at [board] meetings on matters subject to collective bargaining . . . ." Obedience to that order requires that the board, regardless of any other circumstances, not allow Holmquist or other citizens to speak at a meeting required by Wis. Stat. § 66.77 (1) (1973), now § 19.81 (1) (1976), to be open and dedicated to expressions of views by citizens generally on such subjects, even though they conform with all procedural rules, even though the subject upon which they wish to speak may be addressed by union representatives, and even though they are part of the "public" to which the forum is otherwise open. The order is therefore wholly void. The State could no more prevent Holmquist from speaking at this public forum than it could prevent him from publishing the same views in a newspaper or proclaiming them from a soapbox.

I therefore agree that the judgment of the Wisconsin Supreme Court be reversed.

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*See discussion and authorities collected in Brief for the AFL-CIO as *Amicus Curiae* 20-24.

MR. JUSTICE STEWART, concurring in the judgment.

The school board of the city of Madison, acting in accordance with state law, invited all members of the public to attend an open meeting whose agenda included discussion of the desirability of an agency-shop arrangement. The board was entirely willing to hear Holmquist, speaking simply as a member of the community, express his views on this subject. Holmquist did not seek, at the meeting or at any other time, to reach agreement or to bargain with the board. The mere expression of an opinion about a matter subject to collective bargaining, whether or not the speaker is a member of the bargaining unit, poses no genuine threat to the policy of exclusive representation that Wisconsin has adopted. I therefore agree that the order entered by the Wisconsin Employment Relations Commission unconstitutionally restricts freedom of speech.

MR. JUSTICE BRENNAN's concurring opinion reaffirms Mr. Justice Holmes' observation that "[t]he Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445. A public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public. Such a body surely is not prohibited from limiting discussion at public meetings to those subjects that it believes will be illuminated by the views of others. And in trying to best serve its informational needs while rationing its time, I should suppose a public body has broad authority to permit only selected individuals—for example, those who are recognized experts on a matter under consideration—to express their opinions. I write simply to emphasize that we are not called upon in this case to consider what constitutional limitations there may be upon a governmental body's authority to structure discussion at public meetings.

# MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* DE CASTRO

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 75-1197. Argued November 8, 1976—Decided December 13, 1976

The statutory classification of § 202 (b) (1) of the Social Security Act whereby a married woman under 62 whose husband retires or becomes disabled is granted monthly benefits under the Act if she has a minor or other dependent child in her care, but a divorced woman under 62 whose ex-husband retires or becomes disabled does not receive such benefits, *held* not to violate the Due Process Clause of the Fifth Amendment. Such classification, by enabling a married woman already burdened with dependent children to meet the *additional need* created when her husband reaches old age or becomes disabled, comports with the Act's primary objective of providing workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age; and it was not irrational for Congress, in deciding to defer monthly payments to divorced wives of retired or disabled wage earners until they reach the age of 62, to recognize the basic fact that divorced couples typically live separate lives. Pp. 185-189.

403 F. Supp. 23, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., concurred in the judgment.

*Assistant Attorney General Lee* argued the cause for appellant. With him on the briefs were *Solicitor General Bork, Deputy Solicitor General Jones,* and *Leonard Schaitman.*

*Marvin A. Brusman* argued the cause for appellee. With him on the brief was *Theodore R. Sherwin.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Under the Social Security Act a married woman whose husband retires or becomes disabled is granted benefits if she has a minor or other dependent child in her care. A divorced woman whose former husband retires or becomes disabled does not receive such benefits. The issue in the present case is whether this difference in the statutory treatment of married and divorced women is permissible under the Fifth Amendment to the United States Constitution.[1]

## I

Section 202 (b)(1) of the Social Security Act, 49 Stat. 623, as added and amended, 42 U. S. C. § 402 (b)(1) (1970 ed. and Supp. V), provides for the payment of "wife's insurance benefits."[2] To qualify under this section a woman must be the

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[1] It is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles. See, *e. g.*, *Weinberger* v. *Salfi*, 422 U. S. 749, 768–770.

[2] Title 42 U. S. C. § 402 (b)(1) (1970 ed. and Supp. V) provides in full:
"(b) Wife's insurance benefits.

"(1) The wife (as defined in section 416 (b) of this title) and every divorced wife (as defined in section 416 (d) of this title) of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

"(A) has filed application for wife's insurance benefits,

"(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,

"(C) in the case of a divorced wife, is not married, and

"(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual,

"shall (subject to subsection (s) of this section) be entitled to a wife's insurance benefit for each month, beginning with the first month in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs—

"(E) she dies,

"(F) such individual dies,

"(G) in the case of a wife, they are divorced and either (i) she has not attained age 62, or (ii) she has attained age 62 but has not been wife or "divorced wife"[3] of an individual entitled to old-age or disability benefits. Then, assuming that she meets the other statutory requirements, the woman is eligible to receive a monthly payment if she "has attained age 62 or (*in the case of a wife*) has in her care (individually or jointly with [her husband]) a child entitled to a child's insurance benefit . . . ." 42 U. S. C. § 402 (b)(1)(B) (emphasis supplied). As the italicized phrase indicates, a woman under 62 who has in her care an entitled child[4] must currently be married to the wage earner in order to be eligible to receive benefits. A divorced woman receives monthly payments if she is 62 or over and her ex-husband retires or becomes disabled, but if she is under 62, she receives no benefits even if she has a young or disabled child in her care.[5]

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married to such individual for a period of 20 years immediately before the date the divorce became effective,

"(H) in the case of a divorced wife, she marries a person other than such individual,

"(I) in the case of a wife who has not attained age 62, no child of such individual is entitled to a child's insurance benefit,

"(J) she becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of such individual, or

"(K) such individual is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits."

[3] The Act defines "divorced wife" as "a woman divorced from an individual, but only if she had been married to such individual for a period of 20 years immediately before the date the divorce became effective." 42 U. S. C. § 416 (d)(1). The term "divorce" refers to a divorce *a vinculo matrimonii.* § 416 (d)(4).

[4] The conditions upon which a child is entitled to receive "child's insurance benefits" are set out in § 202 (d) of the Act, 42 U. S. C. § 402 (d) (1970 ed. and Supp. V). Generally, the child must be dependent on the wage earner and either under 18 years old (or a full-time student under 22 years old) or under a disability.

[5] The Act also provides for the payment of "widow's insurance benefits" and "mother's insurance benefits." 42 U. S. C. §§ 402 (e), (g) (1970 ed. and Supp. V). Divorced and married women, with or without dependent

The appellee, Helen De Castro, was divorced from her husband in 1968, after more than 20 years of marriage. She cares for a disabled child who is eligible for and receives child's insurance benefits under the Act. In May 1971 her former husband applied for and later was granted old-age insurance benefits. Mrs. De Castro applied for wife's insurance benefits shortly thereafter. At the time of her application she was 56 years old. Her application was denied by the Secretary of Health, Education, and Welfare because no wife's benefits are payable to a divorced wife under 62 years of age.

Mrs. De Castro then filed suit in the United States District Court for the Northern District of Illinois, seeking judicial review of the Secretary's decision. Her complaint alleged that § 202 (b)(1)(B) of the Social Security Act "operates to arbitrarily discriminate against divorced wives," and prayed for an order directing the Secretary to pay benefits to her, a declaration that § 202 (b)(1)(B) is unconstitutional, and an injunction against that section's application.

A three-judge court was convened pursuant to 28 U. S. C. §§ 2281, 2282. The court considered the parties' cross-motions for summary judgment and granted the relief prayed for in the complaint, holding that the wife's benefits provision "invidiously discriminates against divorced wives . . . in violation of the Fifth Amendment." *De Castro* v. *Weinberger,* 403 F. Supp. 23, 30. Central to the court's ruling was its determination that "there is no rational basis for concluding that a married wife having a dependent child in her care has a greater economic need than a divorced wife caring for such a child." *Id.,* at 28. The Secretary appealed directly to this Court under 28 U. S. C. § 1252, and we noted probable jurisdiction, 425 U. S. 957.

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children, are eligible to receive monthly payments under these sections in certain circumstances not pertinent here.

## II

The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis,* 301 U. S. 619, 640. In enacting legislation of this kind a government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams,* 397 U. S. 471, 485.

To be sure, the standard by which legislation such as this must be judged "is not a toothless one," *Mathews* v. *Lucas,* 427 U. S. 495, 510. But the challenged statute is entitled to a strong presumption of constitutionality. "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney,* 406 U. S. 535, 546. It is with this principle in mind that we consider the specific constitutional issue presented by this litigation.

The old-age and disability insurance aspects of the Social Security system do not purport to be general public assistance laws that simply pay money to those who need it most. That was not the predominant purpose of these benefit provisions when they were enacted or when they were amended. Rather, the primary objective was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age.[6]

The wife's insurance benefit at issue here is consistent with this overriding legislative aim: It enables a married woman already burdened with dependent children to meet the *additional need* created when her husband reaches old age or becomes disabled. Accordingly, the District Court's observation that many divorced women receive inadequate child-support payments, while undoubtedly true, is hardly in point. The same can be said of the District Court's statement that "there is no rational basis for concluding that a married wife having a dependent child in her care has a greater economic need than a divorced wife caring for such a child." For whatever relevance these observations might have in a case involving a constitutional attack on a statute that gave monetary benefits to women based on their general overall need, that is not this case.

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[6] The old-age and disability insurance programs are distinct from the provisions for public assistance to the aged and disabled also contained in the Social Security Act. 42 U. S. C. §§ 301–306, 1351–1355, partially repealed by Pub. L. No. 92–603, §§ 303 (a), (b), 86 Stat. 1484; 42 U. S. C. §§ 1381–1383c (1970 ed., Supp. V). The insurance programs are contributory in nature and are designed to prevent public dependency by protecting workers and their families against common economic hazards. Congress in 1935 contemplated that the old-age insurance benefits would be "payable wholly regardless of the need of the recipient." H. R. Rep. No. 615, 74th Cong., 1st Sess., 1 (1935). The public-assistance-for-the-aged program, on the other hand, was designed "to provide for old people who are dependent upon the public for support . . . ," *id.*, at 4, and the statute specifically referred to "aged needy individuals." Social Security Act, § 1, 49 Stat. 620. See also H. R. Rep. No. 615, *supra*, at 3–6; S. Rep. No. 628, 74th Cong., 1st Sess., 4–7 (1935); Message of the President Recommending Legislation on Economic Security, H. R. Doc. No. 81, 74th Cong., 1st Sess., 20–28 (1935).

In 1950 the Act was amended to provide for grants-in-aid to the States so that assistance could be furnished "to needy individuals eighteen years of age or older who are permanently and totally disabled." Social Security Act Amendments of 1950, § 351, 64 Stat. 555. In 1956 Congress created a program for disability insurance benefits. Social Security Amendments of 1956, § 103 (a), 70 Stat. 815. Again, the insurance program, unlike the public assistance provisions, was not need based, but instead was designed to protect against the specific economic hardships created by involuntary, premature retirement. See H. R. Rep. No. 1300, 81st Cong., 1st Sess., 27–28, 53–54 (1949); Recommendations for Social Security Legislation, Reports of the Advisory Council on Social Security, S. Doc. No. 208, 80th Cong., 2d Sess., 69–70, 95–97 (1949); S. Rep. No. 2133, 84th Cong., 2d Sess., 3–4 (1956); H. R. Rep. No. 1189, 84th Cong., 1st Sess., 3–6 (1955).

Section 202 (b)(1)(B) of the Act addresses the particular consequences for his family of a wage earner's old age or disability. Congress could rationally have decided that the resultant loss of family income, the extra expense that often attends illness and old age, and the consequent disruption in the family's economic well-being that may occur when the husband stops working justify monthly payments to a wife who together with her husband must still care for a dependent child.

Indeed, Congress took note of exactly these kinds of factors when it amended the Social Security Act in 1958. Between 1950 and 1958 wives under retirement age with dependent children received benefits only when their husbands became entitled to old-age insurance payments. Social Security Act Amendments of 1950, § 101 (a), 64 Stat. 482. Congress then amended the Act to provide the same benefits when the wage earner becomes disabled.[7] Social Security

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[7] "Wife's insurance benefits" first became part of the Social Security Act in 1939. Amendments enacted that year provided for monthly payments to wives 65 years or older whose husbands were entitled to old-age benefits. Social Security Act Amendments of 1939, § 201, 53 Stat. 1362. In 1950 Congress dropped the age requirement for women with retired husbands and entitled children in their care. Social Security Act Amendments of 1950, § 101 (a), 64 Stat. 482. In 1958 Congress extended similar benefits to wives of any age who had entitled children and disabled husbands. Social Security Amendments of 1958, § 205 (b)(1), 72 Stat. 1021. While the legislative history of the 1950 amendments is sparse, the congressional

Amendments of 1958, § 205 (b)(1), 72 Stat. 1021. Both the House and Senate Committee reports accompanying the proposed legislation explained that the purpose of the monthly payments was to give "recognition to the problems confronting families whose breadwinners" stop work. The focus was specifically on "adequate protection for [the husband's] family," and the reports mentioned the high medical expenses often associated with disability and the possibility that the wife might have to forgo work in order to care for her disabled husband. H. R. Rep. No. 2288, 85th Cong., 2d Sess., 12–13 (1958); S. Rep. No. 2388, 85th Cong., 2d Sess., 10–11 (1958).

In view of the legislative purpose, it is hardly surprising that the congressional judgment evidently was a different one with respect to divorced women. Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. For instance, a divorced wife need not forgo work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or dis-

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purpose presumably was to recognize a family need created when the husband reaches old age and stops working. Certainly the sole purpose could not have been to allow the wife to remain at home to take care of the child, as the appellee suggests, because the presence of the retired husband at home ordinarily would ensure parental supervision. Similarly, when Congress provided benefits in 1958 to wives with disabled husbands, it had purposes beyond the mere encouragement of the wife to stay home and take care of the children. See H. R. Rep. No. 2288, 85th Cong., 2d Sess., 12–13 (1958); S. Rep. No. 2388, 85th Cong., 2d Sess., 10–11 (1958).

ability. In short, divorced couples typically live separate lives. It was not irrational for Congress to recognize this basic fact in deciding to defer monthly payments to divorced wives of retired or disabled wage earners until they reach the age of 62.

This is not to say that a husband's old age or disability may never affect his divorced wife. Many women receive alimony or child support after divorce that their former husbands might not be able to pay when they stop work. But even for this group—which does not include the appellee in the present case—Congress was not constitutionally obligated to use the Social Security Act to subsidize support payments. It could rationally decide that the problems created for divorced women remained less pressing than those faced by women who continue to live with their husbands.

In any event, the constitutional question "is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." *Weinberger* v. *Salfi,* 422 U. S. 749, 777. We conclude, accordingly, that the statutory classifications involved in this case are not of such an order as to infringe upon the Due Process Clause of the Fifth Amendment.

The judgment is reversed.

*It is so ordered.*

MR. JUSTICE MARSHALL concurs in the judgment.

# CRAIG ET AL. *v.* BOREN, GOVERNOR OF OKLAHOMA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75-628. Argued October 5, 1976—Decided December 20, 1976

Appellant Craig, a male then between 18 and 21 years old, and appellant Whitener, a licensed vendor of 3.2% beer, brought this action for declaratory and injunctive relief, claiming that an Oklahoma statutory scheme prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18 constituted a gender-based discrimination that denied to males 18-20 years of age the equal protection of the laws. Recognizing that *Reed* v. *Reed*, 404 U. S. 71, and later cases establish that classification by gender must substantially further important governmental objectives, a three-judge District Court held that appellees' statistical evidence regarding young males' drunk-driving arrests and traffic injuries demonstrated that the gender-based discrimination was substantially related to the achievement of traffic safety on Oklahoma roads. *Held:*

1. Since only declaratory and injunctive relief against enforcement of the gender-based differential was sought, the controversy has been mooted as to Craig, who became 21 after this Court had noted probable jurisdiction. See, *e. g., DeFunis* v. *Odegaard*, 416 U. S. 312. P. 192.

2. Whitener has standing to make the equal protection challenge. Pp. 192-197.

(a) No prudential objective thought to be served by limitations of *jus tertii* standing can be furthered here, where the lower court already has entertained the constitutional challenge and the parties have sought resolution of the constitutional issue. Pp. 193-194.

(b) Whitener in any event independently has established third-party standing. She suffers "injury in fact" since the challenged statutory provisions are addressed to vendors like her, who either must obey the statutory provisions and incur economic injury or disobey the statute and suffer sanctions. In such circumstances, vendors may resist efforts to restrict their operations by advocating the rights of third parties seeking access to their market. See, *e. g., Eisenstadt* v. *Baird*, 405 U. S. 438. Pp. 194-197.

3. Oklahoma's gender-based differential constitutes an invidious discrimination against males 18-20 years of age in violation of the Equal Protection Clause. Appellees' statistics (the most relevant of which

show only that .18% of females and 2% of males in the 18-20-year-old age group were arrested for driving while under the influence of liquor) do not warrant the conclusion that sex represents an accurate proxy for the regulation of drinking and driving. Pp. 199-204.

4. The operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case. The Court has never recognized that application of that Amendment can defeat an otherwise established claim under the Equal Protection Clause, the principles of which cannot be rendered inapplicable here by reliance upon statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. Pp. 204-210.

399 F. Supp. 1304, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined, and in all but Part II-D of which BLACKMUN, J., joined. POWELL, J., *post*, p. 210, and STEVENS, J., *post*, p. 211, filed concurring opinions. BLACKMUN, J., filed a statement concurring in part, *post*, p. 214. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 214. BURGER, C. J., *post*, p. 215, and REHNQUIST, J., *post*, p. 217, filed dissenting opinions.

*Frederick P. Gilbert* argued the cause and filed briefs for appellants.

*James H. Gray*, Assistant Attorney General of Oklahoma, argued the cause for appellees. With him on the brief was *Larry Derryberry*, Attorney General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute, Okla. Stat., Tit. 37, §§ 241 and 245 (1958 and Supp. 1976),[1]

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**Ruth Bader Ginsburg* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

[1] Sections 241 and 245 provide in pertinent part:

§ 241. "It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight.

§ 245. "A 'minor,' for the purposes of Section . . . 241 . . . is defined as a prohibits the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18–20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

This action was brought in the District Court for the Western District of Oklahoma on December 20, 1972, by appellant Craig, a male then between 18 and 21 years of age, and by appellant Whitener, a licensed vendor of 3.2% beer. The complaint sought declaratory and injunctive relief against enforcement of the gender-based differential on the ground that it constituted invidious discrimination against males 18–20 years of age. A three-judge court convened under 28 U. S. C. § 2281 sustained the constitutionality of the statutory differential and dismissed the action. 399 F. Supp. 1304 (1975). We noted probable jurisdiction of appellants' appeal, 423 U. S. 1047 (1976). We reverse.

## I

We first address a preliminary question of standing. Appellant Craig attained the age of 21 after we noted probable jurisdiction. Therefore, since only declaratory and injunctive relief against enforcement of the gender-based differential is sought, the controversy has been rendered moot as to Craig. See, *e. g., DeFunis* v. *Odegaard,* 416 U. S. 312 (1974).[2] The question thus arises whether appellant Whitener, the licensed vendor of 3.2% beer, who has a live controversy against enforcement of the statute, may rely upon the equal protection objections of males 18–20 years of age to establish her claim of

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female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years."

[2] Appellants did not seek class certification of Craig as representative of other similarly situated males 18–20 years of age. See, *e. g., Sosna* v. *Iowa,* 419 U. S. 393, 401 (1975).

unconstitutionality of the age-sex differential. We conclude that she may.

Initially, it should be noted that, despite having had the opportunity to do so,[3] appellees never raised before the District Court any objection to Whitener's reliance upon the claimed unequal treatment of 18–20-year-old males as the premise of her equal protection challenge to Oklahoma's 3.2% beer law. See 399 F. Supp., at 1306 n. 1. Indeed, at oral argument Oklahoma acknowledged that appellees always "presumed" that the vendor, subject to sanctions and loss of license for violation of the statute, was a proper party in interest to object to the enforcement of the sex-based regulatory provision. Tr. of Oral Arg. 41. While such a concession certainly would not be controlling upon the reach of this Court's constitutional authority to exercise jurisdiction under Art. III, see, *e. g., Sierra Club* v. *Morton,* 405 U. S. 727, 732 n. 3 (1972); cf. *Data Processing Service* v. *Camp,* 397 U. S. 150, 151 (1970), our decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary "rule of self-restraint" designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative. See, *e. g., Barrows* v. *Jackson,* 346 U. S. 249, 255, 257 (1953); see also *Singleton* v. *Wulff,* 428 U. S. 106, 123–124 (1976) (POWELL, J., dissenting). These prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here, where the lower court already has entertained the relevant constitutional challenge and the parties have sought—or at least have never resisted—an authoritative constitutional determination. In such circumstances, a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and "cogently," *Holden* v. *Hardy,* 169 U. S. 366, 397 (1898), the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose. Our Brother BLACKMUN's comment is pertinent: "[I]t may be that a class could be assembled, whose fluid membership always included some [males] with live claims. But if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by" the present *jus tertii* champion. *Singleton* v. *Wulff, supra,* at 117–118.

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[3] The District Court's opinion confirms that Whitener from the outset has based her constitutional challenge on gender-discrimination grounds, 399 F. Supp., at 1306, and "[n]o challenge is made to [her] standing and requisite interest in the controversy . . . ." *Id.,* at 1306 n. 1.

In any event, we conclude that appellant Whitener has established independently her claim to assert *jus tertii* standing. The operation of §§ 241 and 245 plainly has inflicted "injury in fact" upon appellant sufficient to guarantee her "concrete adverseness," *Baker* v. *Carr,* 369 U. S. 186, 204 (1962), and to satisfy the constitutionally based standing requirements imposed by Art. III. The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, "sanctions and perhaps loss of license." Tr. of Oral Arg. 41. This Court repeatedly has recognized that such injuries establish the threshold requirements of a "case or controversy" mandated by Art. III. See, *e. g., Singleton* v. *Wulff, supra,* at 113 (doctors who receive payments for their abortion services are "classically adverse" to government as payer); *Sullivan* v. *Little Hunting*

*Park,* 396 U. S. 229, 237 (1969); *Barrows* v. *Jackson, supra,* at 255–256.

As a vendor with standing to challenge the lawfulness of §§ 241 and 245, appellant Whitener is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should her constitutional challenge fail and the statutes remain in force. *Griswold* v. *Connecticut,* 381 U. S. 479, 481 (1965); see Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974). Otherwise, the threatened imposition of governmental sanctions might deter appellant Whitener and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that "enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights." *Warth* v. *Seldin,* 422 U. S. 490, 510 (1975). Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function. See, *e. g., Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Sullivan* v. *Little Hunting Park, supra; Barrows* v. *Jackson, supra.*[4]

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[4] The standing question presented here is not answered by the principle stated in *United States* v. *Raines,* 362 U. S. 17, 21 (1960), that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." In *Raines,* the Court refused to permit certain public officials of Georgia to defend against application of the Civil Rights Act to their official conduct on the ground that the statute also might be construed to encompass the "purely private actions" of others. The *Raines* rule remains germane in such a setting, where the interests of the litigant and the rights of the proposed third parties are in no way mutually interdependent. Thus, a successful suit against Raines did not threaten to impair or diminish the independent private rights of others, and consequently, consideration of those third-party rights properly was deferred until another day.

Of course, the *Raines* principle has also been relaxed where legal action

Indeed, the *jus tertii* question raised here is answered by our disposition of a like argument in *Eisenstadt* v. *Baird*, *supra*. There, as here, a state statute imposed legal duties and disabilities upon the claimant, who was convicted of distributing a package of contraceptive foam to a third party.[5] Since the statute was directed at Baird and penalized his conduct, the Court did not hesitate—again as here—to conclude that the "case or controversy" requirement of Art. III was satisfied. 405 U. S., at 443. In considering Baird's constitutional objections, the Court fully recognized his standing to defend the privacy interests of third parties. Deemed crucial to the decision to permit *jus tertii* standing was the recognition of "the impact of the litigation on the third-party interests." *Id.*, at 445. Just as the defeat of Baird's suit and the "[e]nforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives," *id.*, at 446, so too the failure of Whitener to prevail in this suit and the continued enforcement of §§ 241 and 245 will "materially impair the ability of" males 18–20 years of age to purchase 3.2% beer despite their classification by an overt gender-based criterion. Similarly, just as the Massachusetts law in *Eisenstadt* "prohibit[ed],

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against the claimant threatens to "chill" the First Amendment rights of third parties. See, *e. g.*, *Lewis* v. *New Orleans*, 415 U. S. 130 (1974).

[5] The fact that Baird chose to disobey the legal duty imposed upon him by the Massachusetts anticontraception statute, resulting in his criminal conviction, 405 U. S., at 440, does not distinguish the standing inquiry from that pertaining to the anticipatory attack in this case. In both *Eisenstadt* and here, the challenged statutes compel *jus tertii* claimants either to cease their proscribed activities or to suffer appropriate sanctions. The existence of Art. III "injury in fact" and the structure of the claimant's relationship to the third parties are not altered by the litigative posture of the suit. And, certainly, no suggestion will be heard that Whitener's anticipatory challenge offends the normal requirements governing such actions. See generally *Steffel* v. *Thompson*, 415 U. S. 452 (1974); *Samuels* v. *Mackell*, 401 U. S. 66 (1971); *Younger* v. *Harris*, 401 U. S. 37 (1971).

not use, but distribution," 405 U. S., at 446, and consequently the least awkward challenger was one in Baird's position who was subject to that proscription, the law challenged here explicitly regulates the sale rather than use of 3.2% beer, thus leaving a vendor as the obvious claimant.

We therefore hold that Whitener has standing to raise relevant equal protection challenges to Oklahoma's gender-based law. We now consider those arguments.

## II

### A

Before 1972, Oklahoma defined the commencement of civil majority at age 18 for females and age 21 for males. Okla. Stat., Tit. 15, § 13 (1972 and Supp. 1976). In contrast, females were held criminally responsible as adults at age 18 and males at age 16. Okla. Stat., Tit. 10, § 1101 (a) (Supp. 1976). After the Court of Appeals for the Tenth Circuit held in 1972, on the authority of *Reed* v. *Reed,* 404 U. S. 71 (1971), that the age distinction was unconstitutional for purposes of establishing criminal responsibility as adults, *Lamb* v. *Brown,* 456 F. 2d 18, the Oklahoma Legislature fixed age 18 as applicable to both males and females. Okla. Stat., Tit. 10, § 1101 (a) (Supp. 1976). In 1972, 18 also was established as the age of majority for males and females in civil matters, Okla. Stat., Tit. 15, § 13 (1972 and Supp. 1976), except that §§ 241 and 245 of the 3.2% beer statute were simultaneously codified to create an exception to the gender-free rule.

Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." 404 U. S., at 75. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed,* the objectives of "reducing the workload on probate courts," *id.*, at 76, and "avoiding intrafamily controversy," *id.*, at 77, were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. See, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972); *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973); cf. *Schlesinger* v. *Ballard*, 419 U. S. 498, 506–507 (1975). And only two Terms ago, *Stanton* v. *Stanton*, 421 U. S. 7 (1975), expressly stating that *Reed* v. *Reed* was "controlling," 421 U. S., at 13, held that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds. 421 U. S., at 14–15.[6]

*Reed* v. *Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations, *Schlesinger* v. *Ballard*, *supra*, at 508, concerning the financial position of servicewomen, *Frontiero* v. *Richardson*, *supra*, at 689 n. 23, and working women, *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643 (1975), could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. *Stanton* v. *Stanton, supra; Taylor* v. *Louisiana,* 419 U. S. 522, 535 n. 17 (1975). In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact. See, *e. g., Stanley* v. *Illinois, supra,* at 658; cf. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, 650 (1974).

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[6] *Kahn* v. *Shevin*, 416 U. S. 351 (1974) and *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), upholding the use of gender-based classifications, rested upon the Court's perception of the laudatory purposes of those laws as remedying disadvantageous conditions suffered by women in economic and military life. See 416 U. S., at 353–354; 419 U. S., at 508. Needless to say, in this case Oklahoma does not suggest that the age-sex differential was enacted to ensure the availability of 3.2% beer for women as compensation for previous deprivations.

In this case, too, "*Reed,* we feel, is controlling . . . ," *Stanton* v. *Stanton, supra,* at 13. We turn then to the question whether, under *Reed,* the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

### B

The District Court recognized that *Reed* v. *Reed* was controlling. In applying the teachings of that case, the court found the requisite important governmental objective in the traffic-safety goal proffered by the Oklahoma Attorney General. It then concluded that the statistics introduced by the appellees established that the gender-based distinction was substantially related to achievement of that goal.

### C

We accept for purposes of discussion the District Court's identification of the objective underlying §§ 241 and 245 as the enhancement of traffic safety.[7] Clearly, the protection of public health and safety represents an important function of state and local governments However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal protection challenge.

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[7] That this was the true purpose is not at all self-evident. The pur-

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18–20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for that same age period.[8] Similarly, youths aged 17–21 were found to be overrepresented among those killed

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pose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments. The District Court acknowledged the nonexistence of materials necessary "to reveal what the actual purpose of the legislature was," but concluded that "we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally." 399 F. Supp., at 1311 n. 6. Similarly, the attorney for Oklahoma, while proposing traffic safety as a legitimate rationale for the 3.2% beer law, candidly acknowledged at oral argument that he is unable to assert that traffic safety is "indeed the reason" for the gender line contained in § 245. Tr. of Oral Arg. 27. For this appeal we find adequate the appellee's representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization.

[8] The disparities in 18–20-year-old male-female arrests were substantial for both categories of offenses: 427 versus 24 for driving under the influence of alcohol, and 966 versus 102 for drunkenness. Even if we assume that a legislature may rely on such arrest data in some situations, these figures do not offer support for a differential age line, for the disproportionate arrests of males persisted at older ages; indeed, in the case of arrests for drunkenness, the figures for all ages indicated "even more male involvement in such arrests at later ages." 399 F. Supp., at 1309. See also n. 14, *infra*.

or injured in traffic accidents, with males again numerically exceeding females in this regard.[9] Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts.[10] Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for "driving under the influence."[11] Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma's experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol. Conceding that "the case is not free from doubt," 399 F. Supp., at 1314, the District Court nonetheless concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification." *Id.*, at 1307.

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18–20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit."[12] Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.[13]

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[9] This survey drew no correlation between the accident figures for any age group and levels of intoxication found in those killed or injured.

[10] For an analysis of the results of this exhibit, see n. 16, *infra*.

[11] The FBI made no attempt to relate these arrest figures either to beer drinking or to an 18–21 age differential, but rather found that male arrests for all ages exceeded 90% of the total.

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious methodological problems,[14] the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating." Okla. Stat., Tit. 37, § 163.1 (1958); see *State ex rel. Springer* v. *Bliss,* 199 Okla. 198, 185 P. 2d 220 (1947). Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here.[15] Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer—albeit apparently not of the diluted 3.2% variety—reached results that hardly can be viewed as impressive in justifying either a gender or age classification.[16]

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[12] Obviously, arrest statistics do not embrace all individuals who drink and drive. But for purposes of analysis, this "underinclusiveness" must be discounted somewhat by the shortcomings inherent in this statistical sample, see n. 14, *infra*. In any event, we decide this case in light of the evidence offered by Oklahoma and know of no way of extrapolating these arrest statistics to take into account the driving and drinking population at large, including those who avoided arrest.

[13] For example, we can conjecture that in *Reed*, Idaho's apparent premise that women lacked experience in formal business matters (particularly compared to men) would have proved to be accurate in substantially more than 2% of all cases. And in both *Frontiero* and *Wiesenfeld*, we expressly found appellees' empirical defense of mandatory dependency tests for men but not women to be unsatisfactory, even though we recognized that husbands are still far less likely to be dependent on their wives than vice versa. See, *e. g.*, 411 U. S., at 688–690.

[14] The very social stereotypes that find reflection in age-differential laws, see *Stanton* v. *Stanton*, 421 U. S., 7, 14–15 (1975), are likely substantially to distort the accuracy of these comparative statistics. Hence "reckless" young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home. See, *e. g.*, W. Reckless & B. Kay, The Female Offender 4, 7, 13, 16–17 (Report to Presidential Commission on Law Enforcement and Administration of Justice, 1967). Moreover, the Oklahoma surveys, gathered under a regime where the age-differential law in question has been in effect, are lacking in controls necessary for appraisal of the actual effectiveness of the male 3.2% beer prohibition. In this regard, the disproportionately high arrest statistics for young males—and, indeed, the growing alcohol-related arrest figures for all ages and sexes—simply may be taken to document the relative futility of controlling driving behavior by the 3.2% beer

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statute and like legislation, although we obviously have no means of estimating how many individuals, if any, actually were prevented from drinking by these laws.

[15] See, *e. g.*, nn. 9 and 11, *supra.* See also n. 16, *infra.*

[16] The random roadside survey of drivers conducted in Oklahoma City during August 1972 found that 78% of drivers under 20 were male. Turning to an evaluation of their drinking habits and factoring out nondrinkers, 84% of the males versus 77% of the females expressed a preference for beer. Further 16.5% of the men and 11.4% of the women had consumed some alcoholic beverage within two hours of the interview. Finally, a blood alcohol concentration greater than .01% was discovered in 14.6% of the males compared to 11.5% of the females. "The 1973 figures, although they contain some variations, reflect essentially the same pattern." 399 F. Supp., at 1309. Plainly these statistical disparities between the sexes are not substantial. Moreover, when the 18–20 age boundaries are lifted and all drivers analyzed, the 1972 roadside survey indicates that male drinking rose slightly whereas female exposure to alcohol remained relatively constant. Again, in 1973, the survey established that "compared to all drivers interviewed, . . . the under-20 age group generally showed a lower involvement with alcohol in terms of having drunk within the past two hours or having a significant BAC (blood alcohol content)." *Ibid.* In sum, this survey provides little support for a gender line among teenagers and actually runs counter to the imposition of drinking restrictions based upon age.

There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.[17] Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18–20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under *Reed*, Oklahoma's 3.2% beer statute invidiously discriminates against males 18–20 years of age.

### D

Appellees argue, however, that §§ 241 and 245 enforce state policies concerning the sale and distribution of alcohol and by force of the Twenty-first Amendment should therefore be held to withstand the equal protection challenge. The District Court's response to this contention is unclear. The court assumed that the Twenty-first Amendment "strengthened" the State's police powers with respect to alcohol regulation, 399 F. Supp., at 1307, but then said that "the standards of review that [the Equal Protection Clause] mandates are not relaxed." *Id.*, at 1308. Our view is, and we hold, that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment.

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[17] See, *e. g.*, n. 22, *infra.*

The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the *License Cases,* 5 How. 504, 579 (1847), the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause. Later in the century, however, *Leisy* v. *Hardin,* 135 U. S. 100 (1890), undercut the theoretical underpinnings of the *License Cases.* This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson[18] and Webb-Kenyon Acts.[19] See, *e. g., Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311 (1917) (upholding Webb-Kenyon Act); *In re Rahrer,* 140 U. S. 545 (1891) (upholding Wilson Act). With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and state police power temporarily subsided.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of § 2 of the Twenty-first Amendment[20] closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, *e. g., Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 330 (1964); *Carter* v. *Virginia,* 321 U. S. 131, 139–140 (1944) (Frankfurter, J., concurring); *Finch & Co.* v. *McKittrick,* 305 U. S. 395, 398 (1939). Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* at 332; cf. *Department of Revenue* v. *James Beam Distilling Co.,* 377 U. S. 341 (1964); *Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518 (1938).

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[18] The Wilson Act, enacted in 1890, reads in pertinent part: "All . . . intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory . . . ." 27 U. S. C. § 121.

[19] The Webb-Kenyon Act of 1913 prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . . ." 27 U. S. C. § 122.

[20] "The transportation or importation into any State, Territory, or

Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials, 258 (1975). Any departures from this historical view have been limited and sporadic. Two States successfully relied upon the Twenty-first Amendment to respond to challenges of major liquor importers to state authority to regulate the importation and manufacture of alcoholic beverages on Commerce Clause and Fourteenth Amendment grounds. See *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401 (1938); *State Board* v. *Young's Market Co.,*

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possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

299 U. S. 59, 64 (1936). In fact, however, the arguments in both cases centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* at 330, and n. 9, and touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment, see, *e. g., Joseph E. Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 47–48, 50–51 (1966) (rejecting Fourteenth Amendment objections to state liquor laws on the strength of *Ferguson* v. *Skrupa,* 372 U. S. 726, 729–730 (1963) and *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955)).[21] Cases involving individual rights protected by the Due Process Clause have been treated in sharp contrast. For example, when an individual objected to the mandatory "posting" of her name in retail liquor establishments and her characterization as an "excessive drink[er]," the Twenty-first Amendment was held not to qualify the scope of her due process rights. *Wisconsin* v. *Constantineau,* 400 U. S. 433, 436 (1971).

It is true that *California* v. *LaRue,* 409 U. S. 109, 115 (1972), relied upon the Twenty-first Amendment to "strengthen" the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances "partake more of gross sexuality than of communication," *id.,* at 118. Nevertheless, the Court has never recognized sufficient "strength" in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause.

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[21] The dictum contained in *State Board* v. *Young's Market Co.,* 299 U. S. 59, 64 (1936), that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth," is inapplicable to this case. The Twenty-first Amendment does not recognize, even indirectly, classifications based upon gender. And, as the accompanying text demonstrates, that statement has not been relied upon in recent cases that have considered Fourteenth Amendment challenges to state liquor regulation.

Rather, *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 178-179 (1972), establishes that state liquor regulatory schemes cannot work invidious discriminations that violate the Equal Protection Clause.

Following this approach, both federal and state courts uniformly have declared the unconstitutionality of gender lines that restrain the activities of customers of state-regulated liquor establishments irrespective of the operation of the Twenty-first Amendment. See, *e. g., White* v. *Fleming*, 522 F. 2d 730 (CA7 1975); *Women's Liberation Union of R. I.* v. *Israel*, 512 F. 2d 106 (CA1 1975); *Daugherty* v. *Daley*, 370 F. Supp. 338 (ND Ill. 1974) (three-judge court); *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (SDNY 1970); *Commonwealth Alcoholic Beverage Control Bd.* v. *Burke*, 481 S. W. 2d 52 (Ky. 1972); cf. *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P. 2d 529 (1971); *Paterson Tavern & G. O. A.* v. *Hawthorne*, 57 N. J. 180, 270 A. 2d 628 (1970). Even when state officials have posited sociological or empirical justifications for these gender-based differentiations, the courts have struck down discriminations aimed at an entire class under the guise of alcohol regulation. In fact, social science studies that have uncovered quantifiable differences in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious.[22] In sum, the principles embodied in the Equal

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[22] Thus, if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that States could freely favor Jews and Italian Catholics at the expense of all other Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking. See, *e. g.*, Haberman & Sheinberg, Implicative Drinking Reported in a Household Survey: A Corroborative Note on Subgroup Differences, 28 Q. J. Studies on Alcohol 538 (1967); Wechsler, Thum, Demone, & Dwinnell, Social Characteristics and Blood Alcohol Level, 33 Q. J. Studies on Alcohol 132, 141-142 (1972); Wechsler,

Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.

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Demone, Thum, & Kasey, Religious-Ethnic Differences In Alcohol Consumption, 11 J. Health & Soc. Behavior 21, 28 (1970); Schmidt & Popham, Impressions of Jewish Alcoholics, 37 J. Studies on Alcohol 931 (1976). Similarly, if a State were allowed simply to depend upon demographic characteristics of adolescents in identifying problem drinkers, statistics might support the conclusion that only black teenagers should be permitted to drink, followed by Asian-Americans and Spanish-Americans. "Whites and American Indians have the lowest proportions of abstainers and the highest proportions of moderate/heavy and heavy drinkers." Summary of Final Report of a National Study of Adolescent Drinking Behavior, Attitudes and Correlates 147–148 (Center for the Study of Social Behavior, Research Triangle Inst., Apr. 1975) (percentage of moderate/heavy and heavy adolescent drinkers by race: black 15.2%; Asian-American 18.3%; Spanish-American 22.7%; white 25.3%; American Indian 28.1%).

In the past, some States have acted upon their notions of the drinking propensities of entire groups in fashioning their alcohol policies. The most typical recipient of this treatment has been the American Indian; indeed, several States established criminal sanctions for the sale of alcohol to an Indian or "half or quarter breed Indian." See, *e. g.*, Fla. Stat. Ann. § 569.07 (1962 and 1976 Supp.) (repealed in 1972); Iowa Code Ann. § 732.5 (1950 and 1976 Supp.) (repealed in 1967); Minn. Stat. Ann. § 340.82 (1957) (repealed in 1969); Neb. Rev. Stat. 53–181 (1944) (repealed in 1955); Utah Code Ann. § 76–34–1 (1953 and 1975 Supp.) (repealed in 1955). Other statutes and constitutional provisions proscribed the introduction of alcoholic beverages onto Indian reservations. See, *e. g.*, Act of June 10, 1910, § 2, 36 Stat. 558; Ariz. Const., Art. XX, § 3; N. M. Const., Art. XXI, § 8; Okla. Const., Art. 1, § 7. While Indian-oriented provisions were the most common, state alcohol beverage prohibitions also have been directed at other groups, notably German, Italian, and Catholic immigrants. See, *e. g.*, J. Higham, Strangers in the Land 25, 267–268, 295 (1975). The repeal of most of these laws signals society's perception of the unfairness and questionable constitutionality of singling out groups to bear the brunt of alcohol regulation.

We conclude that the gender-based differential contained in Okla. Stat., Tit. 37, § 245 (1976 Supp.) constitutes a denial of the equal protection of the laws to males aged 18–20[23] and reverse the judgment of the District Court.[24]

*It is so ordered.*

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court as I am in general agreement with it. I do have reservations as to some of the discussion concerning the appropriate standard for equal protection analysis and the relevance of the statistical evidence. Accordingly, I add this concurring statement.

With respect to the equal protection standard, I agree that *Reed* v. *Reed,* 404 U. S. 71 (1971), is the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court's language may imply. *Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present.*

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[23] Insofar as *Goesaert* v. *Cleary,* 335 U. S. 464 (1948), may be inconsistent, that decision is disapproved. Undoubtedly reflecting the view that *Goesaert's* equal protection analysis no longer obtains, the District Court made no reference to that decision in upholding Oklahoma's statute. Similarly, the opinions of the federal and state courts cited earlier in the text invalidating gender lines with respect to alcohol regulation uniformly disparaged the contemporary vitality of *Goesaert.*

[24] As noted in *Stanton* v. *Stanton,* 421 U. S., at 17–18, the Oklahoma Legislature is free to redefine any cutoff age for the purchase and sale of 3.2% beer that it may choose, provided that the redefinition operates in a gender-neutral fashion.

*As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that

I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a " 'fair and substantial relation' " to this objective. *Id.*, at 76, quoting *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920).

It seems to me that the statistics offered by appellees and relied upon by the District Court do tend generally to support the view that young men drive more, possibly are inclined to drink more, and—for various reasons—are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

MR. JUSTICE STEVENS, concurring.

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the

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approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. For thoughtful discussions of equal protection analysis, see, *e. g.*, Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945 (1975).

courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

In this case, the classification is not as obnoxious as some the Court has condemned,[1] nor as inoffensive as some the Court has accepted. It is objectionable because it is based on an accident of birth,[2] because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket,[3] and because, to the extent it reflects any physical difference between males and females, it is actually perverse.[4] The question then is whether the traffic safety justification put forward by the State is sufficient to make an otherwise offensive classification acceptable.

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[1] Men as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups.

[2] "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ,' *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175." *Frontiero* v. *Richardson*, 411 U. S. 677, 686.

[3] Apparently Oklahoma is the only State to permit this narrow discrimination to survive the elimination of the disparity between the age of majority for males and females.

The classification is not totally irrational. For the evidence does indicate that there are more males than females in this age bracket who drive and also more who drink. Nevertheless, there are several reasons why I regard the justification as unacceptable. It is difficult to believe that the statute was actually intended to cope with the problem of traffic safety,[5] since it has only a minimal effect on access to a not very intoxicating beverage and does not prohibit its consumption.[6] Moreover, the empirical data submitted by the State accentuate the unfairness of treating all 18–20-year-old males as inferior to their female counterparts. The legislation imposes a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcholic beverages.[7] It is unlikely that this law will have a significant deterrent effect either on that 2% or on the law-abiding 98%. But even assuming some such slight benefit, it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.

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[4] Because males are generally heavier than females, they have a greater capacity to consume alcohol without impairing their driving ability than do females.

[5] There is no legislative history to indicate that this was the purpose, and several features of the statutory scheme indicate the contrary. The statute exempts license holders who dispense 3.2% beer to their own children, and a related statute makes it unlawful for 18-year-old men (but not women) to work in establishments in which 3.2% beer accounts for over 25% of gross sales. Okla. Stat., Tit. 37, §§ 241, 243, 245 (1953 and Supp. 1976).

There is, of course, no way of knowing what actually motivated this discrimination, but I would not be surprised if it represented nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket. If so, the following comment is relevant:

"[A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (STEVENS, J., dissenting).

[6] It forbids the sale of 3.2% beer to 18–20-year-old men without forbidding possession, or preventing them from obtaining it from other sources,

MR. JUSTICE BLACKMUN, concurring in part.

I join the Court's opinion except Part II–D thereof. I agree, however, that the Twenty-first Amendment does not save the challenged Oklahoma statute.

MR. JUSTICE STEWART, concurring in the judgment.

I agree that the appellant Whitener has standing to assert the equal protection claims of males between 18 and 21 years old. *Eisenstadt* v. *Baird,* 405 U. S. 438, 443–446; *Griswold* v. *Connecticut,* 381 U. S. 479, 481; *Barrows* v. *Jackson,* 346 U. S. 249, 255–260; *Buchanan* v. *Warley,* 245 U. S. 60, 72–73; see Note, Standing To Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 431–436 (1974). I also concur in the Court's judgment on the merits of the constitutional issue before us.

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such as friends who are either older or female. Thus, the statute only slightly impedes access to 3.2% beer.

[7] The only direct evidence submitted by the State concerning use of beer by young drivers indicates that there is no substantial difference between the sexes. In a random roadside survey of drivers, 16.5% of the male drivers under 20 had consumed alcohol within two hours of the interview as opposed to 11.4% of the women. Over three-fourths of the nonabstainers in both groups expressed a preference for beer. And 14.6% of the men, as opposed to 11.5% of the women, had blood alcohol concentrations over .01%. See *ante,* at 203 n. 16.

Every State has broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders. *E. g., California* v. *LaRue,* 409 U. S. 109; *Joseph E. Seagram & Sons* v. *Hostetter,* 384 U. S. 35; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 330; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *State Board* v. *Young's Market Co.,* 299 U. S. 59. But "[t]his is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor . . . ." *California* v. *LaRue, supra,* at 120 n. (concurring opinion).

The disparity created by these Oklahoma statutes amounts to total irrationality. For the statistics upon which the State now relies, whatever their other shortcomings, wholly fail to prove or even suggest that 3.2% beer is somehow more deleterious when it comes into the hands of a male aged 18–20 than of a female of like age. The disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination. See *Reed* v. *Reed,* 404 U. S. 71.

MR. CHIEF JUSTICE BURGER, dissenting.

I am in general agreement with MR. JUSTICE REHNQUIST's dissent, but even at the risk of compounding the obvious confusion created by those voting to reverse the District Court, I will add a few words.

At the outset I cannot agree that appellant Whitener has standing arising from her status as a saloonkeeper to assert the constitutional rights of her customers. In this Court "a litigant may only assert his own constitutional rights or immunities." *United States* v. *Raines,* 362 U. S. 17, 22 (1960). There are a few, but strictly limited exceptions to that rule; despite the most creative efforts, this case fits within none of them.

This is not *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969), or *Barrows* v. *Jackson*, 346 U. S. 249 (1953), for there is here no barrier whatever to Oklahoma males 18–20 years of age asserting, in an appropriate forum, any constitutional rights they may claim to purchase 3.2% beer. Craig's successful litigation of this very issue was prevented only by the advent of his 21st birthday. There is thus no danger of interminable dilution of those rights if appellant Whitener is not permitted to litigate them here. Cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 445–446 (1972).

Nor is this controlled by *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). It borders on the ludicrous to draw a parallel between a vendor of beer and the intimate professional physician-patient relationship which undergirded relaxation of standing rules in that case.

Even in *Eisenstadt*, the Court carefully limited its recognition of third-party standing to cases in which the relationship between the claimant and the relevant third party "was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself." 405 U. S., at 445. This is plainly not the case here. See also *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961); *Brown* v. *United States*, 411 U. S. 223, 230 (1973).

In sum, permitting a vendor to assert the constitutional rights of vendees whenever those rights are arguably infringed introduces a new concept of constitutional standing to which I cannot subscribe.

On the merits, we have only recently recognized that our duty is not "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 33 (1973). Thus, even interests of such importance in our society as public education and housing do not qualify as "fundamental rights" for equal protection purposes because they have no textually independent constitutional status. See *id.*, at 29–39 (education); *Lindsey* v. *Normet*, 405 U. S. 56 (1972) (housing). Though today's decision does not go so far as to make gender-based classifications "suspect," it makes gender a disfavored classification. Without an independent constitutional basis supporting the right asserted or disfavoring the classification adopted, I can justify no substantive constitutional protection other than the normal *McGowan* v. *Maryland*, *supra*, at 425–426, protection afforded by the Equal Protection Clause.

The means employed by the Oklahoma Legislature to achieve the objectives sought may not be agreeable to some judges, but since eight Members of the Court think the means not irrational, I see no basis for striking down the statute as violative of the Constitution simply because we find it unwise, unneeded, or possibly even a bit foolish.

With MR. JUSTICE REHNQUIST, I would affirm the judgment of the District Court.

MR. JUSTICE REHNQUIST, dissenting.

The Court's disposition of this case is objectionable on two grounds. First is its conclusion that *men* challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court's enunciation of this standard, without citation to any source, as being that "classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." *Ante*, at 197 (emphasis added). The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), from their view that sex is a "suspect" classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the "rational basis" equal protection analysis expounded in cases such as *McGowan* v. *Maryland,* 366 U. S. 420 (1961), and *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), and I believe that it is constitutional under that analysis.

## I

In *Frontiero* v. *Richardson, supra,* the opinion for the plurality sets forth the reasons of four Justices for concluding that sex should be regarded as a suspect classification for purposes of equal protection analysis. These reasons center on our Nation's "long and unfortunate history of sex discrimination," 411 U. S., at 684, which has been reflected in a whole range of restrictions on the legal rights of women, not the least of which have concerned the ownership of property and participation in the electoral process. Noting that the pervasive and persistent nature of the discrimination experienced by women is in part the result of their ready identifiability, the plurality rested its invocation of strict scrutiny largely upon the fact that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Id.,* at 686-687. See *Stanton* v. *Stanton,* 421 U. S. 7, 14-15 (1975).

Subsequent to *Frontiero,* the Court has declined to hold that sex is a suspect class, *Stanton* v. *Stanton, supra,* at 13, and no such holding is imported by the Court's resolution of this case. However, the Court's application here of an elevated or "intermediate" level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard. *Jefferson* v. *Hackney,* 406 U. S. 535, 546-547 (1972); *Richardson* v. *Belcher,* 404 U. S. 78, 81-84 (1971); *Dandridge* v. *Williams,* 397 U. S. 471, 484-485 (1970);

*McGowan* v. *Maryland, supra,* at 425–426; *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960); *Williamson* v. *Lee Optical Co., supra,* at 488–489.

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in *Frontiero* to support its invocation of strict scrutiny. There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.

The Court does not discuss the nature of the right involved, and there is no reason to believe that it sees the purchase of 3.2% beer as implicating any important interest, let alone one that is "fundamental" in the constitutional sense of invoking strict scrutiny. Indeed, the Court's accurate observation that the statute affects the selling but not the drinking of 3.2% beer, *ante,* at 204, further emphasizes the limited effect that it has on even those persons in the age group involved. There is, in sum, nothing about the statutory classification involved here to suggest that it affects an interest, or works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection.

It is true that a number of our opinions contain broadly phrased dicta implying that the same test should be applied to all classifications based on sex, whether affecting females or males. *E. g., Frontiero* v. *Richardson, supra,* at 688; *Reed* v. *Reed,* 404 U. S. 71, 76 (1971). However, before today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution.[1] There being no such interest here, and there being no plausible argument that this is a discrimination against females,[2] the Court's reliance on our previous sex-discrimination cases is ill-founded. It treats gender classification as a talisman which—without regard to the rights involved or the persons affected—calls into effect a heavier burden of judicial review.

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[1] In *Stanley* v. *Illinois,* 405 U. S. 645 (1972), the Court struck down a statute allowing separation of illegitimate children from a surviving father

The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized—the

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but not a surviving mother, without any showing of parental unfitness. The Court stated that "the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"

In *Kahn* v. *Shevin*, 416 U. S. 351 (1974), the Court upheld Florida's $500 property tax exemption for widows only. The opinion of the Court appears to apply a rational-basis test, *id.*, at 355, and is so understood by the dissenters. *Id.*, at 357 (BRENNAN, J., joined by MARSHALL, J., dissenting).

In *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), the Court invalidated § 202 (g) of the Social Security Act, which allowed benefits to mothers but not fathers of minor children, who survive the wage earner. This statute was treated, in the opinion of the Court, as a discrimination against female wage earners, on the ground that it minimizes the financial security which their work efforts provide for their families. 420 U. S., at 645.

[2] I am not unaware of the argument from time to time advanced, that all discriminations between the sexes ultimately redound to the detriment of females, because they tend to reinforce "old notions" restricting the roles and opportunities of women. As a general proposition applying equally to all sex categorizations, I believe that this argument was implicitly found to carry little weight in our decisions upholding gender-based differences. See *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Kahn* v. *Shevin*, *supra*. Seeing no assertion that it has special applicability to the situation at hand, I believe it can be dismissed as an insubstantial consideration.

norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

I would have thought that if this Court were to leave anything to decision by the popularly elected branches of the Government, where no constitutional claim other than that of equal protection is invoked, it would be the decision as to what governmental objectives to be achieved by law are "important," and which are not. As for the second part of the Court's new test, the Judicial Branch is probably in no worse position than the Legislative or Executive Branches to determine if there is *any* rational relationship between a classification and the purpose which it might be thought to serve. But the introduction of the adverb "substantially" requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them. And even if we manage to avoid both confusion and the mirroring of our own preferences in the development of this new doctrine, the thousands of judges in other courts who must interpret the Equal Protection Clause may not be so fortunate.

## II

The applicable rational-basis test is one which

> "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than

> others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U. S., at 425-426 (citations omitted).

Our decisions indicate that application of the Equal Protection Clause in a context not justifying an elevated level of scrutiny does not demand "mathematical nicety" or the elimination of all inequality. Those cases recognize that the practical problems of government may require rough accommodations of interests, and hold that such accommodations should be respected unless no reasonable basis can be found to support them. *Dandridge* v. *Williams,* 397 U. S., at 485. Whether the same ends might have been better or more precisely served by a different approach is no part of the judicial inquiry under the traditional minimum rationality approach. *Richardson* v. *Belcher,* 404 U. S., at 84.

The Court "accept[s] for purposes of discussion" the District Court's finding that the purpose of the provisions in question was traffic safety, and proceeds to examine the statistical evidence in the record in order to decide if "the gender-based distinction *closely* serves to achieve that objective." *Ante,* at 199, 200 (emphasis added). (Whether there is a difference between laws which "closely serv[e]" objectives and those which are only "substantially related" to their achievement, *ante,* at 197, we are not told.) I believe that a more traditional type of scrutiny is appropriate in this case, and I think that the Court would have done well here to heed its own warning that "[i]t is unrealistic to expect . . . members of the judiciary . . . to be well versed in the rigors of experimental or statistical technique." *Ante,* at 204. One need not immerse oneself in the fine points of statistical analysis, however, in order to see the weaknesses in the Court's attempted denigration of the evidence at hand.

One survey of arrest statistics assembled in 1973 indicated that males in the 18–20 age group were arrested for "driving under the influence" almost 18 times as often as their female counterparts, and for "drunkenness" in a ratio of almost 10 to 1.[3] Accepting, as the Court does, appellants' comparison of the total figures with 1973 Oklahoma census data, this survey indicates a 2% arrest rate among males in the age group, as compared to a .18% rate among females.

Other surveys indicated (1) that over the five-year period from 1967 to 1972, nationwide arrests among those under 18 for drunken driving increased 138%, and that 93% of all persons arrested for drunken driving were male;[4] (2) that youths in the 17–21 age group were overrepresented among those killed or injured in Oklahoma traffic accidents, that male casualties substantially exceeded female, and that deaths in this age group continued to rise while overall traffic deaths declined;[5] (3) that over three-fourths of the drivers under 20 in the Oklahoma City area are males, and that each of them, on average, drives half again as many miles per year as their female counterparts;[6] (4) that four-fifths of male drivers under 20 in the Oklahoma City area state a drink preference for beer, while about three-fifths of female drivers of that age state the same preference;[7] and (5) that the percentage of male drivers under 20 admitting to drinking within two hours of driving was half again larger than the percentage for females, and that the percentage of male drivers of that age group with a blood alcohol content greater than .01% was almost half again larger than for female drivers.[8]

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[3] Extract from: Oklahoma Bureau of Investigation, Arrest Statistics for September, October, November, and December 1973. Defendants' Exhibit 1, Jurisdictional Statement A22. Extract from: Oklahoma City Police Department, Arrest Statistics for 1973. Defendants' Exhibit 2, Jurisdictional Statement A23. See *ante*, at 200 n. 8.

[4] Extract from: Federal Bureau of Investigation, Crime in the United States, 1972. Defendants' Exhibit 6, App. 182–184.

[5] Extract from: Oklahoma Department of Public Safety, Summary of Statewide Collisions for 1972, 1973. Defendants' Exhibits 4 and 5, Jurisdictional Statement A30–A31.

[6] Extract from: Oklahoma Management and Engineering Consulting, Inc., Report to Alcohol Safety Action Program (1973). Defendants' Exhibit 3, Table 1, Jurisdictional Statement A25.

The Court's criticism of the statistics relied on by the District Court conveys the impression that a legislature in enacting a new law is to be subjected to the judicial equivalent of a doctoral examination in statistics. Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies, and are entitled to draw factual conclusions on the basis of the determination of probable cause which an arrest by a police officer normally represents. In this situation, they could reasonably infer that the incidence of drunk driving is a good deal higher than the incidence of arrest.

And while, as the Court observes, relying on a report to a Presidential Commission which it cites in a footnote, such statistics may be distorted as a result of stereotyping, the legislature is not required to prove before a court that its statistics are perfect. In any event, if stereotypes are as pervasive as the Court suggests, they may in turn influence the conduct of the men and women in question, and cause the young men to conform to the wild and reckless image which is their stereotype.

The Court also complains of insufficient integration of the various surveys on several counts—that the injury and death figures are in no way directly correlated with intoxication, *ante*, at 201 n. 9; that the national figures for drunk driving contain no breakdown for the 18–21-year-old group,

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[7] *Id.*, at A27 (Table 3), A29 (Table 5).

[8] *Id.*, at A25 (Table 1). See *ante*, at 203 n. 16.

*ante,* at 201 n. 11; and that the arrest records for intoxication are not tied to the consumption of 3.2% beer, *ante,* at 201–202, nn. 11 and 12. But the State of Oklahoma—and certainly this Court for purposes of equal protection review—can surely take notice of the fact that drunkenness is a significant cause of traffic casualties, and that youthful offenders have participated in the increase of the drunk-driving problem. On this latter point, the survey data indicating increased driving casualties among 18–21-year-olds, while overall casualties dropped, are not irrelevant.

Nor is it unreasonable to conclude from the expressed preference for beer by four-fifths of the age-group males that that beverage was a predominant source of their intoxication-related arrests. Taking that as the predicate, the State could reasonably bar those males from any purchases of alcoholic beer, including that of the 3.2% variety. This Court lacks the expertise or the data to evaluate the intoxicating properties of that beverage, and in that posture our only appropriate course is to defer to the reasonable inference supporting the statute—that taken in sufficient quantity this beer has the same effect as any alcoholic beverage.

Quite apart from these alleged methodological deficiencies in the statistical evidence, the Court appears to hold that that evidence, on its face, fails to support the distinction drawn in the statute. The Court notes that only 2% of males (as against .18% of females) in the age group were arrested for drunk driving, and that this very low figure establishes "an unduly tenuous 'fit'" between maleness and drunk driving in the 18–20-year-old group. On this point the Court misconceives the nature of the equal protection inquiry.

The rationality of a statutory classification for equal protection purposes does not depend upon the statistical "fit" between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment. Therefore the present equal protection challenge to this gender-based discrimination poses only the question whether the incidence of drunk driving among young men is sufficiently greater than among young women to justify differential treatment. Notwithstanding the Court's critique of the statistical evidence, that evidence suggests clear differences between the drinking and driving habits of young men and women. Those differences are grounds enough for the State reasonably to conclude that young males pose by far the greater drunk-driving hazard, both in terms of sheer numbers and in terms of hazard on a per-driver basis. The gender-based difference in treatment in this case is therefore not irrational.

The Court's argument that a 2% correlation between maleness and drunk driving is constitutionally insufficient therefore does not pose an equal protection issue concerning discrimination between males and females. The clearest demonstration of this is the fact that the precise argument made by the Court would be equally applicable to a flat bar on such purchases by *anyone*, male or female, in the 18–20 age group; in fact it would apply *a fortiori* in that case given the even more "tenuous 'fit'" between drunk-driving arrests and femaleness. The statistics indicate that about 1% of the age group population as a whole is arrested. What the Court's argument is relevant to is not equal protection, but due process—whether there are enough persons in the category who drive while drunk to justify a bar against purchases by all members of the group.

Cast in those terms, the argument carries little weight, in light of our decisions indicating that such questions call for a balance of the State's interest against the harm resulting from any overinclusiveness or underinclusiveness. *Vlandis* v. *Kline*, 412 U. S. 441, 448–452 (1973). The personal interest harmed here is very minor—the present legislation implicates only the right to purchase 3.2% beer, certainly a far cry from the important personal interests which have on occasion supported this Court's invalidation of statutes on similar reasoning. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, 640 (1974); *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972). And the state interest involved is significant—the prevention of injury and death on the highways.

This is not a case where the classification can only be justified on grounds of administrative convenience. *Vlandis* v. *Kline, supra,* at 451; *Stanley* v. *Illinois, supra,* at 656. There being no apparent way to single out persons likely to drink and drive, it seems plain that the legislature was faced here with the not atypical legislative problem of legislating in terms of broad categories with regard to the purchase and consumption of alcohol. I trust, especially in light of the Twenty-first Amendment, that there would be no due process violation if no one in this age group were allowed to purchase 3.2% beer. Since males drink and drive at a higher rate than the age group as a whole, I fail to see how a statutory bar with regard only to them can create any due process problem.

The Oklahoma Legislature could have believed that 18–20-year-old males drive substantially more, and tend more often to be intoxicated than their female counterparts; that they prefer beer and admit to drinking and driving at a higher rate than females; and that they suffer traffic injuries out of proportion to the part they make up of the population. Under the appropriate rational-basis test for equal protection, it is neither irrational nor arbitrary to bar them from making purchases of 3.2% beer, which purchases might in many cases be made by a young man who immediately returns to his vehicle with the beverage in his possession. The record does not give any good indication of the true proportion of males in the age group who drink and drive (except that it is no doubt greater than the 2% who are arrested), but whatever it may be I cannot see that the mere purchase right involved could conceivably raise a due process question. There being no violation of either equal protection or due process, the statute should accordingly be upheld.

# INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, LOCAL 790 v. ROBBINS & MYERS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1264. Argued November 9, 1976—Decided December 20, 1976*

Two days after her discharge by respondent company, petitioner Guy, a Negro, caused a grievance alleging "unfair action" to be filed on her behalf pursuant to procedures in a collective-bargaining agreement between her union and respondent. On February 10, 1972, 84 days after the company under those procedures had denied the grievance, but 108 days after the discharge, petitioner Guy filed a charge of racial discrimination relating to her discharge with the Equal Employment Opportunity Commission (EEOC), which in November 1973 concluded that race had not figured in the discharge. Petitioner Guy then brought this suit under Title VII of the Civil Rights Act of 1964 in the District Court, which thereafter dismissed the suit on the ground that Guy had not filed her charge with the EEOC within 90 days "after the alleged unlawful practice occurred," as required by § 706 (d) (a period later extended to 180 days when, effective March 24, 1972, the Equal Employment Opportunity Act of 1972 amended the limitations provision), and that Guy's resort to the contractual grievance procedure did not extend the time in which to file the Title VII charge. Section 14 of the 1972 amendments provides that the amendments "shall be applicable with respect to charges pending with the Commission on the date of the enactment of this Act and all charges filed thereafter." The Court of Appeals, which affirmed, also concluded that the extension of 180 days could not "revive" a claim that was "barred and extinguished" before the extension's effective date. *Held:*

1. Petitioners' contention, raised explicitly for the first time in this Court, that the date of the conclusion of the grievance procedures, not the date of the discharge, was the "final" date of "the alleged unlawful practice," is without merit as being contrary to the understanding of the parties themselves in the courts below. Pp. 234-235.

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*Together with No. 75-1276, *Guy* v. *Robbins & Myers, Inc.*, also on certiorari to the same court.

2. The existence and utilization of grievance procedures does not toll the running of the limitations period that would otherwise begin on the date of the firing, Title VII remedies being independent of other preexisting remedies available to an aggrieved employee. *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36; *Johnson* v. *Railway Express Agency,* 421 U. S. 454. Pp. 236–240.

(a) Petitioner Guy, by pursuing the grievance procedures, was asserting an independent claim based on a *contract* right and was in no way thereby prevented from filing her charge with the EEOC within 90 days of her discharge. Application of equitable principles to toll the 90-day period pending completion of the grievance procedures is therefore inappropriate here. *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, distinguished. Pp. 237–238.

(b) Congress clearly intended to retain other remedies "against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII," *Johnson* v. *Railway Express Co., supra,* at 465–466. Pp. 239–240.

3. The 1972 amendments and their legislative history demonstrate that Congress intended to apply the 180-day period to a charge such as that filed by Guy where the charge was filed with the EEOC before these amendments became effective, was still pending when the amendments became effective, and alleged a discriminatory occurrence within 180 days on the enactment of the amendment. Pp. 241–243.

4. Lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is not *per se* unconstitutional. Cf. *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 311–312. Pp. 243–244.

525 F. 2d 124, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, STEWART, MARSHALL, and STEVENS, JJ., *post,* p. 244, filed a separate statement.

*Winn Newman* argued the cause for petitioner in No. 75–1264. With him on the briefs were *Ruth Weyand, Michael H. Gottesman, Robert M. Weinberg, J. Albert Woll,* and *Laurence Gold. Barry L. Goldstein* argued the cause for petitioner in No. 75–1276. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Eric Schnapper,* and *Albert J. Rosenthal.*

*Fletcher L. Hudson* argued the cause for respondent Robbins & Myers, Inc., in both cases *pro hac vice.* With him on the brief was *Charles A. Lawrence, Jr.*†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners seek review of a decision of the Court of Appeals for the Sixth Circuit holding that a claim brought by petitioner Dortha Guy under Title VII of the Civil Rights Act of 1964 was barred by her failure to file a charge with the Equal Employment Opportunity Commission (EEOC) within the statutory limitations period. They present three contentions: The existence and utilization of grievance procedures postpone the date on which an allegedly discriminatory firing took place; the existence and utilization of grievance procedures toll the running of the limitations period which would otherwise begin on the date of the firing; and the 1972 amendments to Title VII, Equal Employment Opportunity Act of 1972, 86 Stat. 103 (Mar. 24, 1972), extending the limitations period from 90 to 180 days, apply to the charge in this case.

## I

Respondent Robbins & Myers, Inc. (hereinafter respondent), terminated the employment of petitioner Guy on October 25, 1971, and assigned as its reason for doing so her failure to comply with procedures contained in the collective-bargaining agreement pertaining to leaves of absence. Two days later petitioner caused a grievance alleging an "unfair action" of the company in firing her to be filed on her behalf in accordance with the provisions of the collective-bargaining agreement then in force between petitioner Local 790 of the International Union of Electrical, Radio and Machine Workers (Local 790) and respondent. That agreement's dispute-resolution procedure, which is to be commenced within "five (5) working days of the commission of the act originating the grievance," consists of three grievance steps followed by one arbitration step. Guy's grievance was processed through the third step of the grievance procedure where it was denied on November 18, 1971, with the finding that her termination had been in accordance with the provisions of the collective-bargaining agreement.

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†*Solicitor General Bork, Assistant Attorney General Pottinger, Walter W. Barnett, Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg,* and *Charles S. P. Hodge* filed a brief for the United States as *amicus curiae* urging reversal in both cases.

*Jay S. Siegel* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance in both cases.

On February 10, 1972, a date 84 days after the denial of her grievance at the third stage, but 108 days after the date of her discharge, Guy, who is black, filed a charge of racial discrimination with the EEOC directed against both respondent and Local 790. The EEOC in November 1973 issued its determination and "right to sue" letter, finding that there was "no reason to believe that race was a factor in the decision to discharge" Guy. Her suit in the United States District Court for the Western District of Tennessee under 42 U. S. C. § 2000e–5, was met by a motion to dismiss on the ground, *inter alia,* that it was barred because of her failure to file a charge with the EEOC within 90 days of her discharge, § 706 (d), 42 U. S. C. § 2000e–5 (d).[1] The District Court dismissed her action,[2] and the

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[1] At the time of her discharge, and at the time the charge was filed with the EEOC, § 706 (d) stated, in pertinent part: "A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ." Section 706 (d) was renumbered as § 706 (e), 42 U. S. C. § 2000e–5 (e) (1970 ed., Supp. V), as a result of the 1972 amendments to the Act. Whenever § 706 (d) is cited in this opinion, it refers to the pre-1972 version of what is now § 706 (e).

[2] Guy also alleged a cause of action under 42 U. S. C. § 1981. By order dated May 30, 1974, the District Court dismissed this cause of action

Court of Appeals affirmed that judgment by a divided vote, 525 F. 2d 124 (1975). That court felt that it would be "utterly inconsistent" with our opinions in *Johnson* v. *Railway Express Agency*, 421 U. S. 454 (1975) and in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), to hold that the pursuit of a contractual grievance procedure operates to toll a Title VII remedy "which the employee has a right to resort to concurrently." 525 F. 2d, at 126. Then, noting the question of the applicability of the 1972 amendments to Title VII raised by the EEOC as *amicus curiae* (also noting without more that "[s]ince this issue was not raised in the District Court by any party to the case, we are not required to consider it"), the Court of Appeals stated:

> "Plaintiff Guy's claim was barred on January 24, 1972. She did not file her charge with EEOC until February 10, 1972. The amendments to Title VII, increasing the time within which to file her charge to 180 days, did not become effective until March 24, 1972. 42 U. S. C. § 2000e-5 (e) [1970 ed., Supp. V]. The subsequent increase of time to file the charge enacted by Congress could not revive plaintiff's claim which had been previously barred and extinguished." 525 F. 2d, at 128.

The dissenting judge disagreed on this point, believing that the case should be remanded for consideration of the effect of the 1972 amendments.

We granted certiorari, 425 U. S. 950, to resolve an apparent Circuit conflict on two of these issues: tolling during the pendency of a collective-bargaining-contract's grievance mechanism,[3] and the applicability of the 1972 amendments

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because of a failure to meet the applicable Tennessee statute of limitations. No appeal was taken from this decision.

[3] The question of the tolling of Title VII's limitations period during the pendency of grievance proceedings was noted in our opinion in

to charges filed more than 90 days from the date of the alleged discriminatory act but less than 180 days before the time the amendments became effective.

## II

Before reaching either of those questions, however, petitioners Guy and Local 790 assert that the complaint with the EEOC was timely filed, not because of any tolling concept, but simply because the date "the alleged unlawful employment practice occurred" is the date of the conclusion of the collective-bargaining agreement's grievance-arbitration procedures. Until that time, we are told, the October 25 discharge of Guy (although itself an "occurrence" allowing immediate resort to the EEOC) was "tentative" and "nonfinal," and remained so until she terminated the grievance and arbitration process, at which time the "final" occurrence transpired.[4] As a consequence, according to petitioners, the unfavorable termination of the grievance procedures, making the discharge "final," constituted an "occurrence" enabling Guy to start the 90-day period running from that date.

While the parties could conceivably have agreed to a contract under which management's ultimate adoption of a supervisor's recommendation would be deemed the relevant statutory "occurrence," this was not such a contract. For all that appears Guy was fired as of October 25, 1971, and all parties so understood. She stopped work and ceased receiving pay and benefits as of that date. Unless the griev-

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*McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 277–278 (1976), but had not been decided in the lower courts, and was not presented for us to decide.

[4] This assertion, which is also adopted by the EEOC as *amicus curiae*, is premised on the proposition that "[u]se of the grievance resolution process is not an 'appeal' of a 'final' decision, but is a method of obtaining the judgment of higher management on whether the employee should be retained," Brief for United States as *Amicus Curiae* 21; Brief for Petitioner Local 790, pp. 17–18.

ance procedures resulted in her reinstatement, she would not be entitled to be paid for the period during which the grievance procedures were being implemented.[5] The grievance lodged on October 27, 1971, protests the "unfair action of *Co.* for discharge" (emphasis added), while the complaint filed in the District Court alleges Guy's disagreement, after learning of her discharge, "with the *Company's* determination that she had 'voluntarily quit,'" (emphasis added). Throughout the proceedings both in the District Court and in the Court of Appeals, both sides appear to have assumed, as did the courts, that the date of discharge was October 25, 1971. There being no indication that either party viewed the October 25 discharge as anything other than "final,"[6] there is certainly no reason for us to now torture this mutual understanding by accepting the bare assertions to the contrary raised by petitioners for the first time before this Court.[7]

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[5] Tr. of Oral Arg. 14. Nor is there any indication that, should the grievance mechanism *not* be utilized, any sort of "formalized" final determination by management was required before Guy's discharge would have been considered final. As the EEOC acknowledges, "the employer's foremen usually can fire an individual employee such as Guy," Brief for United States as *Amicus Curiae* 19.

[6] Even while raising the contrary arguments in their briefs before this Court, petitioners place the October 25 discharge as the action of respondent. See, *e. g.,* Brief for Petitioner Local 790, p. 4 ("The following day [October 25, 1971] the Company discharged her on the ground that she had not complied with procedures embodied in the collective bargaining agreement pertaining to return from leaves of absence"); Brief for Petitioner Guy 5 ("The Company discharged Guy on October 25 for having 'voluntarily quit'").

[7] At oral argument, we were told that while this assertion was not articulated as a separate argument before the Court of Appeals, pertinent language in *Moore* v. *Sunbeam Corp.,* 459 F. 2d 811 (CA7 1972), was cited to that court, Tr. of Oral Arg. 11–12. This is hardly a precise way to get an issue before a Court of Appeals, and there is no indication that the Court of Appeals recognized any such implicit contention, assuming, *arguendo,* that petitioners thought they were raising it.

## III

We think that petitioners' arguments for tolling the statutory period for filing a claim with the EEOC during the pendency of grievance or arbitration procedures under the collective-bargaining contract are virtually foreclosed by our decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), and in *Johnson* v. *Railway Express Agency*, 421 U. S. 454 (1975). In *Alexander* we held that an arbitrator's decision pursuant to provisions in a collective-bargaining contract was not binding on an individual seeking to pursue his Title VII remedies in court. We reasoned that the contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII "have legally independent origins and are equally available to the aggrieved employee," 415 U. S., at 52,[8] and for that reason we concluded:

> "[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.*, at 54.

One Term later, we reaffirmed the independence of Title VII remedies from other pre-existing remedies available to an aggrieved employee. In *Johnson* v. *Railway Express Agency*, we held that the timely filing of a charge with the EEOC pursuant to § 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based on the same facts, brought under 42 U. S. C. § 1981. In reaffirming the independence of Title VII remedies from other remedies, we noted that such independence might occasionally be a two-edged sword,[9] but "in the face of congressional emphasis upon the existence and independence of the two remedies," we were disinclined "to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted," 421 U. S., at 461.

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[8] See also 415 U. S., at 48-49: "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." We felt that the legislative history was quite clear in this respect, see, *e. g.*, 110 Cong. Rec. 7205, 13650-13652 (1964); H. R. 9247, 92d Cong., 1st Sess. (1971); H. R. Rep. No. 92-238 (1971); S. Rep. No. 92-415, p. 24 (1971).

Petitioners insist that notwithstanding these decisions, equitable tolling principles should be applied to this litigation, and that the application of such principles would toll the 90-day period pending completion of the grievance procedures. This is so, they say, because here the "policy of repose, designed to protect defendants," *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, 428 (1965), is "outweighed [because] the interests of justice require vindication of the plaintiff's rights."

But this is quite a different situation from *Burnett, supra.*[10] There the plaintiff in a Federal Employers' Liability Act action *had* asserted his FELA claim in the state courts, which had concurrent jurisdiction with the federal courts, but he had the misfortune of filing his complaint in an Ohio State court where venue did not lie under Ohio law. This Court held that such a filing was sufficient to toll the statutory limitations period, even though the state-court action was dismissed for improper venue and a new complaint ultimately filed in the United States District Court. The Court said:

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[9] "Conciliation and persuasion through the administrative process [*e. g.,* Title VII], to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one," 421 U. S., at 461.

[10] In no way is this a situation in which a party has "been prevented from asserting" his or her rights, *Burnett* v. *New York Central R. Co.,* 380 U. S., at 429. There is no assertion that Guy was "prevented" from filing a charge with the EEOC within 90 days of October 25, 1971; indeed, it is conceded and even urged that she could have filed it the following day, had she so wished.

> "Petitioner here did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction. Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action." *Id.,* at 429.

Here petitioner Guy in the grievance proceedings was not asserting the same statutory claim in a different forum, nor giving notice to respondent of that statutory claim, but was asserting an independent claim based on a *contract* right, *Alexander* v. *Gardner-Denver Co., supra,* at 53–54, 56–58. *Burnett* cannot aid this petitioner, see *Johnson* v. *Railway Express Agency, supra,* at 467, and n. 14.[11]

Petitioners advance as a corollary argument for tolling the premise that substantial policy considerations, based on the central role of arbitration in labor-management relations, see *Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564 (1960); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957), also dictate a finding that the Title VII limitations period is tolled in this situation. Similar arguments by the employer in *Alexander* v. *Gardner-Denver Co.,* urging the superiority and pre-eminence of the arbitration process were rejected by us in that case, and we find the reasoning of that case controlling in rejecting this claim made by petitioners.

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[11] We concluded in *Johnson* that "[o]nly where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period," 421 U. S., at 468 n. 14. See n. 14, *infra.*

Petitioners also advance a related argument that the danger of possible conflict between the concurrent pursuit of both collective-bargaining and Title VII remedies should result in tolling the limitations period for the latter while the former proceeds to conclusion. Similar arguments to these, albeit relating to 42 U. S. C. § 1981 and not to private labor agreements, were however, raised and rejected in *Johnson.* We think the language we used in that case is sufficient to dispose of this claim:

> "[I]t is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding. One answer to this, although perhaps not a highly satisfactory one, is that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed. But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." 421 U. S., at 465–466.

Petitioners contend at some length that tolling would impose almost no costs, as the delays occasioned by the grievance-arbitration process would be "slight,"[12] noting that the maximum delay in invoking the three-stage grievance procedure (although not including the arbitration step) under the collective-bargaining agreement in force in this case would be 35 days. But the principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites "with precision," *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 47, Congress did not leave to courts the decision as to which delays might or might not be "slight."[13]

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[12] Petitioners contend that the vast majority of collective-bargaining agreements have stringent time restrictions on the resolution of disputes through the grievance stages, see, *e. g.,* Brief for Petitioner Local 790, pp. 38–39; see also Brief for United States as *Amicus Curiae* 23 n. 13.

Congress did provide in § 706 (b) one exception for this 90-day limitations period, when it provided that the limitations period should run for a maximum additional 120 days when there existed "a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof." Where Congress has spoken with respect to a claim much more closely related to the Title VII claim than is the contractual claim pursued under the grievance procedure, and then firmly limited the maximum possible extension of the limitations period applicable thereto, we think that all of petitioners' arguments taken together simply do not carry sufficient weight to overcome the negative implication from the language used by Congress, cf. *Johnson* v. *Railway Express Agency*, 421 U. S., at 461.[14]

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[13] Even taken on its own ground, this argument is not unambiguously favorable to petitioners. If the collective-bargaining dispute-settlement procedures are as speedy as suggested, no real need for tolling has been shown. In the instant case, for example, at the conclusion of stage three of the grievance procedure, Guy still had 66 days in which to file a charge with the EEOC, and no reason has been advanced as to why this was not ample time.

[14] Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII, see § 706 (b). The grievance process assures no such comparable notice. In the instant

## IV

Guy filed her charge with the EEOC on February 10, 1972, 108 days after her October 25, 1971, discharge. On March 24, 1972, the Equal Employment Opportunity Act of 1972, 86 Stat. 103, extended to 180 days the time within which to file a claim with the EEOC, § 706 (e). Petitioners contend that this expanded limitations period should apply to Guy's charge, as the occurrence she was complaining of took place within 180 days of the enactment of the 1972 amendments. We agree.

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113, states:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

Respondent asserts that § 14, which was added by amendment to the bill on the floor of the House by Senator Javits, 118 Cong. Rec. 4816 (1972), was designed for the sole purpose of having the new enforcement powers given to the EEOC apply to pending charges, see letter of Feb. 14, 1972,

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case, the grievance alleged only an "unfair action." Even if racial discrimination is explicitly discussed, however, the grievance procedure properly involves only *contractual* questions, and would but fortuitously implicate the Title VII standards, *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 53–54, 56–58; see also *Johnson* v. *Railway Express Agency*, 421 U. S., at 467–468, n. 14. Petitioners' arguments respecting the policies behind private resolution of labor disputes through collective bargaining, moreover, apply equally to the arbitration stage as they do to the grievance stage, cf. *Emporium Capwell Co.* v. *Community Org.*, 420 U. S. 50, 66–67 (1975); *Alexander* v. *Gardner-Denver Co.*, *supra*, at 56, 59–60; *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). Yet, at the arbitration stage the assurance of but a "slight" delay is lacking.

from David L. Norman, Assistant Attorney General, Civil Rights Division of the Department of Justice, to Senator Dominick, quoted in *EEOC* v. *Christiansburg Garment Co.,* 376 F. Supp. 1067, 1074 (WD Va. 1974). However, the explicit statutory language used applies to *all* amendments made by the Act to § 706, not simply to the new enforcement provisions. As Senator Javits did not limit his remarks on the floor so as to indicate that § 14's retroactivity was designed to apply only to the new enforcement provisions,[15] the legislative history does not make this one of those unusual cases in which a court may infer, contrary to the language actually used, that Congress intended to so limit the scope of § 14, cf. also S. Rep. No. 91-1137, p. 31 (1970).

Respondent also contends that the amendment is not applicable to the charge filed by Guy with the EEOC, since, being untimely when filed, her charge could not have been "pending with the Commission on the date of enactment of this Act." This reading of "pending"—confining it to charges still before the Commission *and* timely when filed—is not the only possible meaning of the word, is largely rebutted by the legislative history,[16] and renders the language of § 14 virtually meaningless insofar as the enlarged limitations period is concerned. Since Congress also applied the enlarged limitations period to charges, whether or not untimely on March 24, "filed thereafter," we should not presume Congress created this odd hiatus in retroactivity suggested by respondent unless congressional intent to do so was conveyed by language more precise than "pending," cf. *Love* v. *Pullman Co.,* 404 U. S. 522 (1972). "Pending" is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example, would be an interpretation that read "pending" to mean "filed and not yet rejected," cf. Leg. Hist., *supra,* n. 16, at 1851. We hold that Congress intended the 180-day period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, and alleged a discriminatory occurrence within 180 days of the enactment of the Act.[17]

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[15] Indeed, the comment of Senator Javits implied precisely the opposite: "MR. JAVITS. Mr. President, this amendment would make whatever we do enact into law applicable to pending cases. The Department of Justice has requested it in a letter to the minority leader; that is my reason for offering it." 118 Cong. Rec. 4816 (1972).

[16] Section 14 was stated to be designed to cover "charges filed with the Commission prior to the effective date of the Act," Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of Equal Employment Act of 1972, p. 1851 (Comm. Print 1972); see also *id.,* at 1777.

Respondent contends, finally, that Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period. This contention rests on an unwarrantedly broad reading of our opinion in *William Danzer Co.* v. *Gulf & Ship Island R. Co.,* 268 U. S. 633 (1925). *Danzer* was given a narrow reading in the later case of *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 312 n. 8 (1945). The latter case states the applicable constitutional test in this language:

> "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a

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[17] Accordingly, we need not decide whether the enlarged limitations period also redounds to the benefit of persons who filed a charge more than 90, but less than 180, days from the date of the alleged "occurrence," where the 180 days had run prior to March 24, 1972.

> statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." *Id.*, at 315–316.

Applying that test to this litigation, we think that Congress might constitutionally provide for retroactive application of the extended limitations period which it enacted.

We thus resolve against petitioners their first two contentions, but resolve the third in their favor. The judgment of the Court of Appeals for the Sixth Circuit is therefore reversed, and the cases are remanded for further proceedings consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS agree that the expanded 180-day limitations period enacted by 86 Stat. 103 applied to Guy's charge and would reverse the Court of Appeals on that ground without addressing the questions discussed in Parts II and III of the Court's opinion.

# CONNALLY *v.* GEORGIA

## ON APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 76-461. Decided January 10, 1977

A justice of the peace's issuance of a search warrant to search appellant's house, pursuant to Georgia statutory scheme whereby a justice of the peace, who is not salaried, is paid a prescribed fee for *issuance* of each warrant but receives nothing for his *denial* of a warrant, *held* to effect a violation of the protections afforded appellant by the Fourth and Fourteenth Amendments. In such a situation the defendant is subjected to judicial action by an officer of the court who "has a direct, personal, substantial, pecuniary interest," *Tumey* v. *Ohio,* 273 U. S. 510, 523, in his decision to issue or deny the warrant.

237 Ga. 203, 227 S. E. 2d 352, vacated and remanded.

PER CURIAM.

Appellant John Connally was indicted, tried, and convicted in the Superior Court of Walker County, Ga., for possession of marihuana in violation of the Georgia Controlled Substances Act, Ga. Code Ann. § 79A-801 *et seq.* (1973). On his appeal to the Supreme Court of Georgia, he asserted trial error in four respects: the constitutional impropriety of the fee system governing the issuance of search warrants by justices of the peace in Georgia; the deprivation of his right of confrontation when revelation of an informer's identity was refused; the failure to give a requested instruction on joint occupancy of premises; and the failure to enter a judgment of acquittal because of an alleged absence of proof of the type of cannabis involved. The Supreme Court of Georgia affirmed, with two justices dissenting (one on the first issue) and one justice concurring as to the second, third, and fourth issues and in the judgment. 237 Ga. 203, 227 S. E. 2d 352 (1976). The appellant, on direct appeal here,[1] raises the first two questions. We deem the challenge to the warrant procedure worthy of consideration.

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[1] Cf. *Stone* v. *Powell,* 428 U. S. 465 (1976).

Pursuant to a search warrant issued by a justice of the peace, appellant's house was raided and marihuana found there was seized. Connally was arrested. At his trial he moved to suppress the evidence so seized on the ground that the justice who had issued the warrant was not "a neutral and detached magistrate" [2] because he had a pecuniary interest in issuing the warrant. The trial court denied that motion, and the Supreme Court of Georgia, in affirming, rejected the constitutional challenge.

Under Ga. Code Ann. § 24–1601 (1971), the fee for the issuance of a search warrant by a Georgia justice of the peace "shall be" $5, "and it shall be lawful for said [justice] of the peace to charge and collect the same." If the requested warrant is refused, the justice of the peace collects no fee for reviewing and denying the application. The fee so charged apparently goes into county funds and from there to the issuing justice as compensation.

At a pretrial hearing in Connally's case, the issuing justice testified on cross-examination that he was a justice primarily because he was "interested in a livelihood," Record 502; that he received no salary, *ibid.;* that his compensation was "directly dependent on how many warrants" he issued, *ibid.;* that since January 1, 1973, he had issued "some 10,000" warrants for arrests or searches, *ibid.;* and that he had no legal background other than attendance at seminars and reading law, *id.*, at 506–508, 512–515.[3]

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[2] See *Johnson* v. *United States*, 333 U. S. 10, 14 (1948); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 453 (1971); *Shadwick* v. *City of Tampa*, 407 U. S. 345, 350 (1972).

[3] "Q In the case of a search warrant, I believe you receive compensation ultimately in the amount of $5.00, if you issue the warrant, do you not?

"A That's true.

[*Footnote 3 is continued on p. 247*]

Fifty years ago, in *Tumey* v. *Ohio,* 273 U. S. 510 (1927), the Court considered state statutes that permitted a charge of violating the State's prohibition laws to be tried without

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"Q If you choose not to issue the warrant, what compensation do you receive?

"A I don't know.

"Q You receive no compensation?

"A Well, I never have, I'll put it that way.

"Q Now with respect to issuing the search warrant, Mr. Murphy, does the $5.00, since that's the only way you get paid, does that enter your mind when you're sitting there contemplating whether or not to issue a search warrant?

"A It has.

"Q As a matter of fact, I believe you quite honestly and candidly told me on the day we had that preliminary hearing up here, I believe that was on, the best I can recall, it was on the 18th of May, that you would be a liar if you said it didn't enter your mind?

"A That's what I said.

"Q Is that true now, you would be [a] liar if you said it didn't enter your mind?

"A It's only human nature to me.

. . . . .

"Q Okay. Now, I believe you said you had been a J. P. since January 1st of 1973, is that correct?

"A Yes, sir.

"Q All right. Now, since January—you have to run for that office, or is it an appointed office?

"A Yes sir, it's an elected office.

"Q Well, you ran for the office for the purpose of having employment and earning a living, is that correct?

"A That's part of it.

"Q Of course, you like in other people's motivations, primarily you were interested in a livelihood?

"A True.

"Q Now do you support yourself with the salary or with the fees that you receive in a J. P. system down here, or as J. P.?

"A Uh huh, yes sir.

"Q And you receive no salary at all, so that your compensation is directly dependent on how many warrants you issue, is that correct?

[*Footnote 3 is continued on p. 248*]

a jury before a village mayor. Any fine imposed was divided between the State and the village. The latter's share was used to hire attorneys and detectives to arrest offenders and

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"A That's right.

"Q Now, since January 1st, 1973, I believe you told me the other day, and let me ask you again, you have issued some 10,000 warrants of the arrest—either arrest or search warrants, is that correct?

"A That's pretty close, total warrants.

"Q Okay. Total warrants?

"A Criminal warrants.

"Q That would be right about 10,000 of them?

"A Uh huh.

. . . . .

"Q Now with respect to the qualifications that you have for your office, of course, the people of Walker County elected you and under the law that would qualify you, but I believe the law prescribes some qualifications that you must have prior to the time you are elected, what are those qualifications?

"A You have to be a resident of the militia district in which you're running for that office, registered voter, it might sound stupid but that's all I remember.

. . . . .

"Q Okay. Now of course, the people have selected you as the J. P. for this militia district, and you have the qualifications that you mentioned that you are a resident and of age and so on and so forth, other than those, do you have any background, legal background or other background with respect to the instruments and issuance of warrants?

"A No, sir.

"Q So, the qualifications that you have mentioned are your sole qualifications for holding your job, is that correct?

"A That's right.

"Q Okay.

"A Up to the time I was elected.

"MR. DANIEL: Okay, sir, that's all I have.

"THE COURT: Have you done anything since you were elected to improve any qualifications that might be necessary?

"THE WITNESS: Yes, sir.

"THE COURT: What have you done?

"THE WITNESS: I have attended several training seminars sponsored by our J. P. State Association, as a matter of fact, I'm leaving prosecute them before the mayor. When the mayor convicted, he received fees and costs, and these were in addition to his salary. The Court, in an opinion by Mr. Chief Justice Taft, unanimously held that subjecting a defendant to trial before a judge having "a direct, personal, pecuniary interest in convicting the defendant," that is, in the $12 of fees and costs imposed, *id.*, at 523, 531, effected a denial of due process in violation of the Fourteenth Amendment.

This approach was reiterated in *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972). There, an Ohio statute authorized mayors to sit as judges of ordinance violations and certain traffic offenses. The petitioner was so convicted and fined by the mayor of Monroeville. Although the mayor had no direct personal financial stake in the outcome of cases before him, a major portion of the village's income was derived from the fines, fees, and costs imposed in the mayor's court. This Court, *id.*, at 59–60, cited *Tumey* and repeated the test formulated in that case, namely, "whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . .'" 409 U. S., at 60. *Dugan* v. *Ohio,* 277 U. S. 61 (1928), where a mayor had judicial functions but only "very limited executive authority," and the executive power rested in a city manager and a commission, was distinguished as a situation where "the Mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as [a] judge," 409 U. S., at 60–61,

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this afternoon if I can get out of here to go to a 2-day training seminar in Warner Robbins, Georgia, sponsored by the same State Association.

"I've bought one manual, study course from Judson-Pace at my own expense and attempted to learn a little bit more about the duties." Record 499–500, 501–502, 506–508.

and the possibility of a later *de novo* trial in another court was held to be of no constitutional relevance because the defendant was "entitled to a neutral and detached judge in the first instance." *Id.*, at 61–62.

The present case, of course, is not precisely the same as *Tumey* or as *Ward*, but the principle of those cases, we conclude, is applicable to the Georgia system for the issuance of search warrants by justices of the peace. The justice is not salaried. He is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his *issuance* of the warrant, and he receives nothing for his *denial* of the warrant. His financial welfare, therefore, is enhanced by positive action and is not enhanced by negative action. The situation, again, is one which offers "a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused." It is, in other words, another situation where the defendant is subjected to what surely is judicial action by an officer of a court who has "a direct, personal, substantial, pecuniary interest" in his conclusion to issue or to deny the warrant. See *Bennett* v. *Cottingham*, 290 F. Supp. 759, 762–763 (ND Ala. 1968), aff'd, 393 U. S. 317 (1969).

*Shadwick* v. *City of Tampa*, 407 U. S. 345 (1972), does not weigh to the contrary. The issue there centered in the qualification of municipal court clerks to issue arrest warrants for breaches of ordinances. The Court held that the clerks, although laymen, worked within the judicial branch under the supervision of judges and were qualified to determine the existence of probable cause. They were, therefore, "neutral and detached magistrates for purposes of the Fourth Amendment." *Id.*, at 346. There was no element of personal financial gain in the clerks' issuance or nonissuance of arrest warrants. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 449–453 (1971).

We disagree with the Supreme Court of Georgia's rulings, 237 Ga., at 205–206, 227 S. E. 2d, at 354–355, that the amount of the search warrant fee is *de minimis* in the present context, that the unilateral character of the justice's adjudication of probable cause distinguishes the present case from *Tumey,* and that, instead, this case equates with *Bevan* v. *Krieger,* 289 U. S. 459, 465–466 (1933), where a notary public's fee for taking a deposition was measured by the folios of testimony taken.

We therefore hold that the issuance of the search warrant by the justice of the peace in Connally's case effected a violation of the protections afforded him by the Fourth and Fourteenth Amendments of the United States Constitution. The judgment of the Supreme Court of Georgia is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*So ordered.*

# VILLAGE OF ARLINGTON HEIGHTS ET AL. v. METROPOLITAN HOUSING DEVELOPMENT CORP. ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-616. Argued October 13, 1976—Decided January 11, 1977

Respondent Metropolitan Housing Development Corp. (MHDC), a nonprofit developer, contracted to purchase a tract within the boundaries of petitioner Village in order to build racially integrated low- and moderate-income housing. The contract was contingent upon securing rezoning as well as federal housing assistance. MHDC applied to the Village for the necessary rezoning from a single-family to a multiple-family (R-5) classification. At a series of Village Plan Commission public meetings, both supporters and opponents touched upon the fact that the project would probably be racially integrated. Opponents also stressed zoning factors that pointed toward denial of MHDC's application: The location had always been zoned single-family, and the Village's apartment policy called for limited use of R-5 zoning, primarily as a buffer between single-family development and commercial or manufacturing districts, none of which adjoined the project's proposed location. After the Village denied rezoning, MHDC and individual minority respondents filed this suit for injunctive and declaratory relief, alleging that the denial was racially discriminatory and violated, *inter alia,* the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act. The District Court held that the Village's rezoning denial was motivated not by racial discrimination but by a desire to protect property values and maintain the Village's zoning plan. Though approving those conclusions, the Court of Appeals reversed, finding that the "ultimate effect" of the rezoning denial was racially discriminatory and observing that the denial would disproportionately affect blacks, particularly in view of the fact that the general suburban area, though economically expanding, continued to be marked by residential segregation. *Held:*

1. MHDC and at least one individual respondent have standing to bring this action. Pp. 260-264.

(a) MHDC has met the constitutional standing requirements by showing injury fairly traceable to petitioners' acts. The challenged action of the Village stands as an absolute barrier to constructing the housing for which MHDC had contracted, a barrier which could be removed if injunctive relief were granted. MHDC, despite the contingency provisions in its contract, has suffered economic injury based upon the expenditures it made in support of its rezoning petition, as well as noneconomic injury from the defeat of its objective, embodied in its specific project, of making suitable low-cost housing available where such housing is scarce. Pp. 261–263.

(b) Whether MHDC has standing to assert the constitutional rights of its prospective minority tenants need not be decided, for at least one of the individual respondents, a Negro working in the Village and desirous of securing low-cost housing there but who now lives 20 miles away, has standing. Focusing on the specific MHDC project, he has adequately alleged an "actionable causal relationship" between the Village's zoning practices and his asserted injury. *Warth* v. *Seldin,* 422 U. S. 490, 507. Pp. 263–264.

2. Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment, and respondents failed to carry their burden of proving that such an intent or purpose was a motivating factor in the Village's rezoning decision. Pp. 264–271.

(a) Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "[Such] impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Washington* v. *Davis,* 426 U. S. 229, 242. A racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers, must be shown. Pp. 264–268.

(b) The evidence does not warrant overturning the concurrent findings of both courts below that there was no proof warranting the conclusion that the Village's rezoning decision was racially motivated. Pp. 268–271.

3. The statutory question whether the rezoning decision violated the Fair Housing Act of 1968 was not decided by the Court of Appeals and should be considered on remand. P. 271.

517 F. 2d 409, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Blackmun, and Rehnquist, JJ., joined. Marshall, J., filed an opinion concurring in part and dissenting in part, in which Brennan, J., joined, *post,* p. 271. White, J., filed a dissenting opinion, *post,* p. 272. Stevens, J., took no part in the consideration or decision of the case.

*Jack M. Siegel* argued the cause and filed briefs for petitioners.

*F. Willis Caruso* argued the cause for respondents. With him on the briefs were *Carol M. Petersen* and *Robert G. Schwemm.**

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois.[1] They alleged that the denial was racially discriminatory and that it violated, *inter alia,* the Fourteenth Amendment and the Fair Housing Act of 1968, 82 Stat. 81, 42 U. S. C. § 3601 *et seq.* Following a bench trial, the District Court entered judgment for the Village, 373 F. Supp. 208 (1974), and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. 517 F. 2d 409 (1975). We granted the Village's petition for certiorari, 423 U. S. 1030 (1975), and now reverse.

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*Briefs of *amici curiae* urging affirmance were filed by *Conrad N. Bagne* for the American Society of Planning Officials, and by *Abe Fortas* and *Stephen C. Shamberg* for the League of Women Voters of the United States et al.

[1] Respondents named as defendants both the Village and a number of its officials, sued in their official capacity. The latter were the Mayor, the Village Manager, the Director of Building and Zoning, and the entire Village Board of Trustees. For convenience, we will occasionally refer to all the petitioners collectively as "the Village."

# I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east the Viatorian property directly adjoins the backyards of other single-family homes.

The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under § 236 of the National Housing Act, 48 Stat. 1246, as added and amended, 12 U. S. C. § 1715z-1.[2]

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[2] Section 236 provides for "interest reduction payments" to owners of rental housing projects which meet the Act's requirements, if the savings are passed on to the tenants in accordance with a rather complex formula. Qualifying owners effectively pay 1% interest on money borrowed to

MHDC is such a developer. It was organized in 1968 by several prominent Chicago citizens for the purpose of building low- and moderate-income housing throughout the Chicago area. In 1970 MHDC was in the process of building one § 236 development near Arlington Heights and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

After some negotiation, MHDC and the Order entered into a 99-year lease and an accompanying agreement of sale covering a 15-acre site in the southeast corner of the Viatorian property. MHDC became the lessee immediately, but the sale agreement was contingent upon MHDC's securing zoning clearances from the Village and § 236 housing assistance from the Federal Government. If MHDC proved unsuccessful in securing either, both the lease and the contract of sale would lapse. The agreement established a bargain purchase price of $300,000, low enough to comply with federal limitations governing land-acquisition costs for § 236 housing.

MHDC engaged an architect and proceeded with the proj-

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construct, rehabilitate, or purchase their properties. (Section 236 has been amended frequently in minor respects since this litigation began. See 12 U. S. C. § 1715z-1 (1970 ed., Supp. V), and the Housing Authorization Act of 1976, § 4, 90 Stat. 1070.)

New commitments under § 236 were suspended in 1973 by executive decision, and they have not been revived. Projects which formerly could claim § 236 assistance, however, will now generally be eligible for aid under § 8 of the United States Housing Act of 1937, as amended by § 201 (a) of the Housing and Community Development Act of 1974, 42 U. S. C. § 1437f (1970 ed., Supp. V), and by the Housing Authorization Act of 1976, § 2, 90 Stat. 1068. Under the § 8 program, the Department of Housing and Urban Development contracts to pay the owner of the housing units a sum which will make up the difference between a fair market rent for the area and the amount contributed by the low-income tenant. The eligible tenant family pays between 15% and 25% of its gross income for rent. Respondents indicated at oral argument that, despite the demise of the § 236 program, construction of the MHDC project could proceed under § 8 if zoning clearance is now granted.

ect, to be known as Lincoln Green. The plans called for 20 two-story buildings with a total of 190 units, each unit having its own private entrance from the outside. One hundred of the units would have a single bedroom, thought likely to attract elderly citizens. The remainder would have two, three, or four bedrooms. A large portion of the site would remain open, with shrubs and trees to screen the homes abutting the property to the east.

The planned development did not conform to the Village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R–5, its multiple-family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under § 236. The materials made clear that one requirement under § 236 is an affirmative marketing plan designed to assure that a subsidized development is racially integrated. MHDC also submitted studies demonstrating the need for housing of this type and analyzing the probable impact of the development. To prepare for the hearings before the Plan Commission and to assure compliance with the Village building code, fire regulations, and related requirements, MHDC consulted with the Village staff for preliminary review of the development. The parties have stipulated that every change recommended during such consultations was incorporated into the plans.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the "social issue"—the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate-income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village's Board of Trustees that it deny the request. The motion stated: "While the need for low and moderate income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location." Two members voted against the motion and submitted a minority report, stressing that in their view the change to accommodate Lincoln Green represented "good zoning." The Village Board met on September 28, 1971, to consider MHDC's request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

The following June MHDC and three Negro individuals filed this lawsuit against the Village, seeking declaratory and injunctive relief.[3] A second nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs. The trial resulted in a judgment for petitioners. Assuming that MHDC had standing to bring the suit,[4] the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning, but rather by a desire "to protect property values and the integrity of the Village's zoning plan." 373 F. Supp., at 211. The District Court concluded also that the denial would not have a racially discriminatory effect.

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[3] The individual plaintiffs sought certification of the action as a class action pursuant to Fed. Rule Civ. Proc. 23 but the District Court declined to certify. 373 F. Supp. 208, 209 (1974).

A divided Court of Appeals reversed. It first approved the District Court's finding that the defendants were motivated by a concern for the integrity of the zoning plan, rather than by racial discrimination. Deciding whether their refusal to rezone would have discriminatory effects was more complex. The court observed that the refusal would have a disproportionate impact on blacks. Based upon family income, blacks constituted 40% of those Chicago area residents who were eligible to become tenants of Lincoln Green, although they composed a far lower percentage of total area population. The court reasoned, however, that under our decision in *James* v. *Valtierra*, 402 U. S. 137 (1971), such a disparity in racial impact alone does not call for strict scrutiny of a municipality's decision that prevents the construction of the low-cost housing.[5]

There was another level to the court's analysis of allegedly discriminatory results. Invoking language from *Kennedy Park Homes Assn.* v. *City of Lackawanna*, 436 F. 2d 108,

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[4] A different District Judge had heard early motions in the case. He had sustained the complaint against a motion to dismiss for lack of standing, and the judge who finally decided the case said he found "no need to reexamine [the predecessor judge's] conclusions" in this respect. *Ibid.*

[5] Nor is there reason to subject the Village's action to more stringent review simply because it involves respondents' interest in securing housing. *Lindsey* v. *Normet*, 405 U. S. 56, 73–74 (1972). See generally *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 18–39 (1973).

112 (CA2 1970), cert. denied, 401 U. S. 1010 (1971), the Court of Appeals ruled that the denial of rezoning must be examined in light of its "historical context and ultimate effect."[6] 517 F. 2d, at 413. Northwest Cook County was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The court held that Arlington Heights could not simply ignore this problem. Indeed, it found that the Village had been "exploiting" the situation by allowing itself to become a nearly all-white community. *Id.*, at 414. The Village had no other current plans for building low- and moderate-income housing, and no other R–5 parcels in the Village were available to MHDC at an economically feasible price.

Against this background, the Court of Appeals ruled that the denial of the Lincoln Green proposal had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values met this exacting standard. The court therefore concluded that the denial violated the Equal Protection Clause of the Fourteenth Amendment.

## II

At the outset, petitioners challenge the respondents' standing to bring the suit. It is not clear that this challenge was pressed in the Court of Appeals, but since our jurisdiction to decide the case is implicated, *Jenkins* v. *McKeithen,* 395 U. S. 411, 421 (1969) (plurality opinion), we shall consider it.

In *Warth* v. *Seldin,* 422 U. S. 490 (1975), a case similar in some respects to this one, we reviewed the constitutional limitations and prudential considerations that guide a court in determining a party's standing, and we need not repeat that discussion here. The essence of the standing question, in its constitutional dimension, is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.*, at 498–499, quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, see *United States* v. *SCRAP*, 412 U. S. 669, 688 (1973), but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 41–42 (1976); *O'Shea* v. *Littleton*, 414 U. S. 488, 498 (1974); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

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[6] This language apparently derived from our decision in *Reitman* v. *Mulkey,* 387 U. S. 369, 373 (1967) (quoting from the opinion of the California Supreme Court in the case then under review).

### A

Here there can be little doubt that MHDC meets the constitutional standing requirements. The challenged action of the petitioners stands as an absolute barrier to constructing the housing MHDC had contracted to place on the Viatorian site. If MHDC secures the injunctive relief it seeks, that barrier will be removed. An injunction would not, of course, guarantee that Lincoln Green will be built. MHDC would still have to secure financing, qualify for federal subsidies,[7] and carry through with construction. But all housing developments are subject to some extent to similar uncertainties. When a project is as detailed and specific as Lincoln Green, a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy. MHDC has shown an injury to itself that is "likely to be redressed by a favorable decision." *Simon* v. *Eastern Ky. Welfare Rights Org., supra,* at 38.

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[7] Petitioners suggest that the suspension of the § 236 housing-assistance program makes it impossible for MHDC to carry out its proposed project and therefore deprives MHDC of standing. The District Court also expressed doubts about MHDC's position in the case in light of the suspension. 373 F. Supp., at 211. Whether termination of all available assistance programs would preclude standing is not a matter we need to decide, in view of the current likelihood that subsidies may be secured under § 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. See n. 2, *supra*.

Petitioners nonethless appear to argue that MHDC lacks standing because it has suffered no economic injury. MHDC, they point out, is not the owner of the property in question. Its contract of purchase is contingent upon securing rezoning.[8] MHDC owes the owners nothing if rezoning is denied.

We cannot accept petitioners' argument. In the first place, it is inaccurate to say that MHDC suffers no economic injury from a refusal to rezone, despite the contingency provisions in its contract. MHDC has expended thousands of dollars on the plans for Lincoln Green and on the studies submitted to the Village in support of the petition for rezoning. Unless rezoning is granted, many of these plans and studies will be worthless even if MHDC finds another site at an equally attractive price.

Petitioners' argument also misconceives our standing requirements. It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing. *United States* v. *SCRAP*, *supra*, at 686–687; *Sierra Club* v. *Morton*, 405 U. S. 727, 734 (1972); *Data Processing Service* v. *Camp*, 397 U. S. 150, 154 (1970). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See *Sierra Club* v. *Morton*, *supra*, at 739. The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decisionmaking. *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 221 (1974).

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[8] Petitioners contend that MHDC lacks standing to pursue its claim here because a contract purchaser whose contract is contingent upon rezoning cannot contest a zoning decision in the Illinois courts. Under the law of Illinois, only the owner of the property has standing to pursue such an action. *Clark Oil & Refining Corp.* v. *City of Evanston,* 23 Ill. 2d 48, 177 N. E. 2d 191 (1961); but see *Solomon* v. *City of Evanston,* 29 Ill. App. 3d 782, 331 N. E. 2d 380 (1975).

State law of standing, however, does not govern such determinations in the federal courts. The constitutional and prudential considerations canvassed at length in *Warth* v. *Seldin,* 422 U. S. 490 (1975), respond to concerns that are peculiarly federal in nature. Illinois may choose to close its courts to applicants for rezoning unless they have an interest more direct than MHDC's, but this choice does not necessarily disqualify MHDC from seeking relief in federal courts for an asserted injury to its federal rights.

### B

Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Nectow* v. *City of Cambridge*, 277 U. S. 183 (1928); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974). But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth* v. *Seldin*, 422 U. S., at 499. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See *Barrows* v. *Jackson*, 346 U. S. 249 (1953); cf. *Sullivan* v.

*Little Hunting Park,* 396 U. S. 229, 237 (1969); *Buchanan* v. *Warley,* 245 U. S. 60, 72–73 (1917). For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own.[9]

Respondent Ransom, a Negro, works at the Honeywell factory in Arlington Heights and lives approximately 20 miles away in Evanston in a 5-room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build in Arlington Heights. Ransom testified at trial that if Lincoln Green were built he would probably move there, since it is closer to his job.

The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a "substantial probability," *Warth* v. *Seldin, supra,* at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights. His is not a generalized grievance. Instead, as we suggested in *Warth, supra,* at 507, 508 n. 18, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See *id.,* at 505; *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U. S., at 41–42. Unlike the individual plaintiffs in *Warth,* Ransom has adequately averred an "actionable causal relationship" between Arlington Heights' zoning practices and his asserted injury. *Warth* v. *Seldin, supra,* at 507. We therefore proceed to the merits.

## III

Our decision last Term in *Washington* v. *Davis,* 426 U. S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases,[10] the holding in *Davis* reaffirmed a principle well established in a variety of contexts. *E. g., Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 208 (1973) (schools); *Wright* v. *Rockefeller*, 376 U. S. 52, 56–57 (1964) (election districting); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (1945) (jury selection).

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[9] Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.

*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[11] In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[12]

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[10] *Palmer* v. *Thompson*, 403 U. S. 217, 225 (1971); *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 461–462 (1972); cf. *United States* v. *O'Brien*, 391 U. S. 367, 381–386 (1968). See discussion in *Washington* v. *Davis*, 426 U. S., at 242–244.

[11] In *McGinnis* v. *Royster*, 410 U. S. 263, 276–277 (1973), in a somewhat different context, we observed:

"The search for legislative purpose is often elusive enough, *Palmer* v. *Thompson*, 403 U. S. 217 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington* v. *Davis*, *supra*, at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Guinn* v. *United States*, 238 U. S. 347 (1915); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy.[13] But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative,[14] and the Court must look to other evidence.[15]

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[12] For a scholarly discussion of legislative motivation, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 116–118.

[13] Several of our jury-selection cases fall into this category. Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*. See, *e. g.*, *Turner* v. *Fouche*, 396 U. S. 346, 359 (1970); *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967).

[14] This is not to say that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act—in the exercise of the zoning power as elsewhere—would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions. See *City of Richmond* v. *United States*, 422 U. S. 358, 378 (1975).

[15] In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the "heterogeneity" of the Nation's population. *Jefferson* v. *Hackney*, 406 U. S. 535, 548 (1972); see also *Washington* v. *Davis*, *supra*, at 248.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See *Lane* v. *Wilson, supra; Griffin* v. *School Board,* 377 U. S. 218 (1964); *Davis* v. *Schnell,* 81 F. Supp. 872 (SD Ala.), aff'd *per curiam,* 336 U. S. 933 (1949); cf. *Keyes* v. *School Dist. No. 1, Denver Colo., supra,* at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman* v. *Mulkey,* 387 U. S. 369, 373–376 (1967); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250 (1936). For example, if the property involved here always had been zoned R–5 but suddenly was changed to R–3 when the town learned of MHDC's plans to erect integrated housing,[16] we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.[17]

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[16] See, *e. g., Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222 (CA7 1961) (park board allegedly condemned plaintiffs' land for a park upon learning that the homes plaintiffs were erecting there would be sold under a marketing plan designed to assure integration); *Kennedy Park Homes Assn.* v. *City of Lackawanna,* 436 F. 2d 108 (CA2 1970), cert. denied, 401 U. S. 1010 (1971) (town declared moratorium on new subdivisions and rezoned area for parkland shortly after learning of plaintiffs' plans to build low-income housing). To the extent that the decision in *Kennedy Park Homes* rested solely on a finding of discriminatory impact, we have indicated our disagreement. *Washington* v. *Davis, supra,* at 244–245.

[17] See *Dailey* v. *City of Lawton,* 425 F. 2d 1037 (CA10 1970). The plaintiffs in *Dailey* planned to build low-income housing on the site of a former school that they had purchased. The city refused to rezone the land from PF, its public facilities classification, to R–4, high-density residential. All the surrounding area was zoned R–4, and both the present and the former planning director for the city testified that there was no reason "from a zoning standpoint" why the land should not be

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See *Tenney* v. *Brandhove,* 341 U. S. 367 (1951); *United States* v. *Nixon,* 418 U. S. 683, 705 (1974); 8 J. Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).[18]

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

## IV

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in *Washington* v. *Davis, supra.* The respondents proceeded on the erroneous theory that the Village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision.

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classified R-4. Based on this and other evidence, the Court of Appeals ruled that "the record sustains the [District Court's] holding of racial motivation and of arbitrary and unreasonable action." *Id.,* at 1040.

[18] This Court has recognized, ever since *Fletcher* v. *Peck,* 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 420 (1971). The problems involved have prompted a good deal of scholarly commentary. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 356-361 (1949); A. Bickel, The Least Dangerous Branch 208-221 (1962); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Brest, *supra,* n. 12.

In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants." 373 F. Supp., at 211.

On appeal the Court of Appeals focused primarily on respondents' claim that the Village's buffer policy had not been consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive. The court concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board's decision to deny other rezoning proposals. "The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner." 517 F. 2d, at 412. The Court of Appeals therefore approved the District Court's findings concerning the Village's purposes in denying rezoning to MHDC.

We also have reviewed the evidence. The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion. The area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures.[19] The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

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[19] Respondents have made much of one apparent procedural departure. The parties stipulated that the Village Planner, the staff member whose primary responsibility covered zoning and planning matters, was never

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.[20]

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.[21]

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asked for his written or oral opinion of the rezoning request. The omission does seem curious, but respondents failed to prove at trial what role the Planner customarily played in rezoning decisions, or whether his opinion would be relevant to respondents' claims.

[20] Respondents complain that the District Court unduly limited their efforts to prove that the Village Board acted for discriminatory purposes, since it forbade questioning Board members about their motivation at the time they cast their votes. We perceive no abuse of discretion in the circumstances of this case, even if such an inquiry into motivation would otherwise have been proper. See n. 18, *supra*. Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision. In light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation, the District Court's action was not improper.

[21] Proof that the decision by the Village was motivated in part by a

This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

## V

Respondents' complaint also alleged that the refusal to rezone violated the Fair Housing Act of 1968, 42 U. S. C. § 3601 *et seq.* They continue to urge here that a zoning decision made by a public body may, and that petitioners' action did, violate § 3604 or § 3617. The Court of Appeals, however, proceeding in a somewhat unorthodox fashion, did not decide the statutory question. We remand the case for further consideration of respondents' statutory claims.

*Reversed and remanded.*

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I concur in Parts I–III of the Court's opinion. However, I believe the proper result would be to remand this entire case to the Court of Appeals for further proceedings consistent with *Washington* v. *Davis*, 426 U. S. 229 (1976), and today's opinion. The Court of Appeals is better situated

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racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See *Mt. Healthy City Board of Ed.* v. *Doyle*, *post*, p. 274.

than this Court both to reassess the significance of the evidence developed below in light of the standards we have set forth and to determine whether the interests of justice require further District Court proceedings directed toward those standards.

MR. JUSTICE WHITE, dissenting.

The Court reverses the judgment of the Court of Appeals because it finds, after re-examination of the evidence supporting the concurrent findings below, that "[r]espondents . . . failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." *Ante,* at 270. The Court reaches this result by interpreting our decision in *Washington* v. *Davis,* 426 U. S. 229 (1976), and applying it to this case, notwithstanding that the Court of Appeals rendered its decision in this case before *Washington* v. *Davis* was handed down, and thus did not have the benefit of our decision when it found a Fourteenth Amendment violation.

The Court gives no reason for its failure to follow our usual practice in this situation of vacating the judgment below and remanding in order to permit the lower court to reconsider its ruling in light of our intervening decision. The Court's articulation of a legal standard nowhere mentioned in *Davis* indicates that it feels that the application of *Davis* to these facts calls for substantial analysis. If this is true, we would do better to allow the Court of Appeals to attempt that analysis in the first instance. Given that the Court deems it necessary to re-examine the evidence in the case in light of the legal standard it adopts, a remand is especially appropriate. As the cases relied upon by the Court indicate, the primary function of this Court is not to review the evidence supporting findings of the lower courts. See, *e. g., Wright* v. *Rockefeller,* 376 U. S. 52, 56–57 (1964); *Akins* v. *Texas,* 325 U. S. 398, 402 (1945).

A further justification for remanding on the constitutional issue is that a remand is required in any event on respondents' Fair Housing Act claim, 42 U. S. C. § 3601 *et seq.*, not yet addressed by the Court of Appeals. While conceding that a remand is necessary because of the Court of Appeals' "unorthodox" approach of deciding the constitutional issue without reaching the statutory claim, *ante,* at 271, the Court refuses to allow the Court of Appeals to reconsider its constitutional holding in light of *Davis* should it become necessary to reach that issue.

Even if I were convinced that it was proper for the Court to reverse the judgment below on the basis of an intervening decision of this Court and after a re-examination of concurrent findings of fact below, I believe it is wholly unnecessary for the Court to embark on a lengthy discussion of the standard for proving the racially discriminatory purpose required by *Davis* for a Fourteenth Amendment violation. The District Court found that the Village was motivated "by a legitimate desire to protect property values and the integrity of the Village's zoning plan." The Court of Appeals accepted this finding as not clearly erroneous, and the Court quite properly refuses to overturn it on review here. There is thus no need for this Court to list various "evidentiary sources" or "subjects of proper inquiry" in determining whether a racially discriminatory purpose existed.

I would vacate the judgment of the Court of Appeals and remand the case for consideration of the statutory issue and, if necessary, for consideration of the constitutional issue in light of *Washington* v. *Davis.*

# MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION *v.* DOYLE

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1278. Argued November 3, 1976—Decided January 11, 1977

Respondent, an untenured teacher (who had previously been involved in an altercation with another teacher, an argument with school cafeteria employees, an incident in which he swore at students, and an incident in which he made obscene gestures to girl students), conveyed through a telephone call to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The radio station announced the adoption of the dress code as a news item. Thereafter, petitioner School Board, adopting a recommendation of the superintendent, advised respondent that he would not be rehired and cited his lack of tact in handling professional matters, with specific mention of the radio station and obscene-gesture incidents. Respondent then brought this action against petitioner for reinstatement and damages, claiming that petitioner's refusal to rehire him violated his rights under the First and Fourteenth Amendments. Although respondent asserted jurisdiction under both 28 U. S. C. § 1343 and § 1331, the District Court rested jurisdiction only on § 1331. The District Court, which found that the incidents involving respondent had occurred, concluded that the telephone call was "clearly protected by the First Amendment" and that because it had played a "substantial part" in petitioner's decision not to rehire respondent he was entitled to reinstatement with backpay. The Court of Appeals affirmed. Petitioner, in addition to attacking the District Court's jurisdiction under § 1331 on the ground that the $10,000 jurisdictional requirement of that provision was not satisfied in this case, raised an additional jurisdictional issue after this Court had granted certiorari and after petitioner had filed its reply brief, claiming that respondent's only substantive constitutional claim arises under 42 U. S. C. § 1983 and that because petitioner School Board is not a "person" for purposes of § 1983, liability may no more be imposed on it where federal jurisdiction rests on § 1331 than where jurisdiction is grounded on § 1343. *Held:*

1. Respondent's complaint sufficiently pleaded jurisdiction under 28 U. S. C. § 1331. Though the amount in controversy thereunder must

exceed $10,000, even if the District Court had chosen to award only compensatory damages, it was far from a "legal certainty" at the time of suit that respondent would not have been entitled to more than that amount. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288–289. Pp. 276–277.

2. Petitioner in making its belated contention concerning § 1983 failed to preserve the issue whether the complaint stated a claim upon which relief could be granted against it. Because the question involved is not of the jurisdictional sort which the Court raises on its own motion, it is assumed without deciding that respondent could sue under § 1331 without regard to the limitations imposed by § 1983. Pp. 277–279.

3. Since under Ohio law the "State" does not include "political subdivisions" (a category including school districts), and the record shows that a local school board like petitioner is more like a county or city than it is an arm of the State, petitioner is not immune from suit under the Eleventh Amendment. Pp. 279–281.

4. Respondent's constitutional claims are not defeated because he did not have tenure. *Perry* v. *Sindermann*, 408 U. S. 593. Pp. 283–284.

5. That conduct protected by the First and Fourteenth Amendments played a substantial part in the decision not to rehire respondent does not necessarily amount to a constitutional violation justifying remedial action. The proper test is one that protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights. Since respondent here satisfied the burden of showing that his conduct was constitutionally protected and was a motivating factor in the petitioner's decision not to rehire him, the District Court should have gone on to determine whether petitioner had shown by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Pp. 284–287.

529 F. 2d 524, vacated and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

*Philip S. Olinger* argued the cause and filed briefs for petitioner.

*Michael H. Gottesman* argued the cause for respondent. With him on the brief were *Robert M. Weinberg, David Rubin, Eugene Green, Dennis Haines, Anthony P. Sgambatti II*, and *Barry R. Laine*.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution. After a bench trial the District Court held that Doyle was entitled to reinstatement with backpay. The Court of Appeals for the Sixth Circuit affirmed the judgment, 529 F. 2d 524, and we granted the Board's petition for certiorari, 425 U. S. 933, to consider an admixture of jurisdictional and constitutional claims.

## I

Although the respondent's complaint asserted jurisdiction under both 28 U. S. C. § 1343 and 28 U. S. C. § 1331, the District Court rested its jurisdiction only on § 1331. Petitioner's first jurisdictional contention, which we have little difficulty disposing of, asserts that the $10,000 amount in controversy required by that section is not satisfied in this case.

The leading case on this point is *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283 (1938), which stated this test:

> "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction." *Id.,* at 288–289. (Footnotes omitted.)

We have cited this rule with approval as recently as *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 642 n. 10 (1975), and think it requires disposition of the jurisdictional question tendered by the petition in favor of the respondent. At the time Doyle brought this action for reinstatement and $50,000 damages, he had already accepted a job in a different school system paying approximately $2,000 per year less than he would have earned with the Mt. Healthy Board had he been rehired. The District Court in fact awarded Doyle compensatory damages in the amount of $5,158 by reason of income already lost at the time it ordered his reinstatement. Even if the District Court had chosen to award only compensatory damages and not reinstatement, it was far from a "legal certainty" at the time of suit that Doyle would not have been entitled to more than $10,000.

## II

The Board has filed a document entitled "Supplemental Authorities" in which it raises quite a different "jurisdictional" issue from that presented in its petition for certiorari and disposed of in the preceding section of this opinion. Relying on the District Court opinion in *Weathers* v. *West Yuma County School Dist.*, 387 F. Supp. 552, 556 (Colo. 1974), the Board contends that even though Doyle may have met the jurisdictional amount requirement of § 1331, it may not be subjected to liability in this case because Doyle's only substantive constitutional claim arises under 42 U. S. C. § 1983. Because it is not a "person" for purposes of § 1983, the Board reasons, liability may no more be imposed on it where federal jurisdiction is grounded on 28 U. S. C. § 1331 than where such jurisdiction is grounded on 28 U. S. C. § 1343.

The District Court avoided this issue by reciting that it had not "stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that the case is properly here as a § 1331 case, as well as a § 1983 one." App. to Pet. for Cert. 14a–15a. This reference to our decisions in *Monroe* v. *Pape,* 365 U. S. 167 (1961), and *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973), where it was held that a municipal corporation is not a suable "person" under § 1983, raises the question whether petitioner Board in this case is sufficiently like the municipal corporations in those cases so that it, too, is excluded from § 1983 liability.

The quoted statement of the District Court makes clear its view that if the jurisdictional basis for the action is § 1331, the limitations contained in 42 U. S. C. § 1983 do not apply. The Board argues, on the contrary, that since Congress in § 1983 has expressly created a remedy relating to violations of constitutional rights under color of state law, one who seeks to recover for such violations is bound by the limitations contained in § 1983 whatever jurisdictional section he invokes.

The question of whether the Board's arguments should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent.

The Board has raised this question for the first time in a document filed after its reply brief in this Court. Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737, 740 (1976); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). And if this were a § 1983 action, brought under the special jurisdictional provision of 28 U. S. C. § 1343 which requires no amount in controversy, it would be appropriate for this Court to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged. *City of Kenosha* v. *Bruno, supra.* However, where an action is brought under § 1331, the catchall federal-question provision requiring in excess of $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." *Bell* v. *Hood,* 327 U. S. 678, 682 (1946); *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.,* 341 U. S. 246, 249 (1951).

Here respondent alleged that the Board had violated his rights under the First and Fourteenth Amendments and claimed the jurisdictionally necessary amount of damages. The claim that the Board is a "person" under § 1983, even assuming the correctness of the Board's argument that the § 1331 action is limited by the restrictions of § 1983, is not so patently without merit as to fail the test of *Bell* v. *Hood, supra.* Therefore, the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the Court raises on its own motion. The related question of whether a school district is a person for purposes of § 1983 is likewise not before us. We leave those questions for another day, and assume, without deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U. S. C. § 1983.

## III

The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio statute and decisional law. In view of the treatment of waiver by a State of its Eleventh Amendment immunity from suit in *Ford Motor Co.* v. *Dept. of Treasury,* 323 U. S. 459, 464–466 (1945), we are less sure than was the District Court that Ohio had consented to suit against entities such as the Board in the federal courts. We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Ford Motor Co.* v. *Dept. of Treasury, supra,* but does not extend to counties and similar municipal corporations. See *Lincoln County* v. *Luning,* 133 U. S. 529, 530 (1890); *Moor* v. *County of Alameda,* 411 U. S. 693, 717–721 (1973). The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law. Under Ohio law the "State" does not include "political subdivisions," and "political subdivisions" do include local school districts. Ohio Rev. Code Ann. § 2743.01 (Page Supp. 1975). Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev. Code Ann. § 3301.07 (Page 1972 and Supp. 1975), and receives a significant amount of money from the State. Ohio Rev. Code Ann. § 3317 (Page 1972 and Supp. 1975). But local school boards have extensive powers to issue bonds, Ohio Rev. Code Ann. § 133.27 (Page 1969), and to levy taxes within certain restrictions of state law. Ohio Rev. Code Ann. §§ 5705.02, 5705.03, 5705.192, 5705.194 (Page 1973 and Supp. 1975). On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

## IV

Having concluded that respondent's complaint sufficiently pleaded jurisdiction under 28 U. S. C. § 1331, that the Board has failed to preserve the issue whether that complaint stated a claim upon which relief could be granted against the Board, and that the Board is not immune from suit under the Eleventh Amendment, we now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum—on a subject which he apparently understood was to be settled by joint teacher-administration action—was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene-gesture incident.[1]

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. App. to Pet. for Cert. 12a–13a. The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief *per curiam* opinion. 529 F. 2d 524.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry* v. *Sindermann,* 408 U. S. 593 (1972).

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[1] "I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

"A. You assumed the responsibility to notify W. S. A. I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

"B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

"Sincerely yours,
"Rex Ralph
"Superintendent"

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

The District Court made the following "conclusions" on this aspect of the case:

> "1) If a non-permissible reason, e. g., exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permissible grounds—the decision may not stand (citations omitted).
>
> "2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on 'tact'—that is not to say that the 'tactfulness' is irrelevant to other issues in this case." App. to Pet. for Cert. 12a–13a.

At the same time, though, it stated that

> "[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." *Id.*, at 12a.

Since respondent Doyle had no tenure, and there was therefore not even a state-law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally *could* have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

In *Lyons* v. *Oklahoma,* 322 U. S. 596 (1944), the Court held that even though the first confession given by a defendant had been involuntary, the Fourteenth Amendment did not prevent the State from using a second confession obtained 12 hours later if the coercion surrounding the first confession had been sufficiently dissipated as to make the second confession voluntary. In *Wong Sun* v. *United States,* 371 U. S. 471, 491 (1963), the Court was willing to assume that a defendant's arrest had been unlawful, but held that "the connection between the arrest and the statement [given several days later] had 'become so attenuated as to dissipate the taint.' *Nardone* v. *United States,* 308 U. S. 338, 341." *Parker* v. *North Carolina,* 397 U. S. 790, 796 (1970), held that even though a confession be assumed to have been involuntary in the constitutional sense of the word, a guilty plea entered over a month later met the test for the voluntariness of such a plea. The Court in *Parker* relied on the same quoted language from *Nardone, supra,* as did the Court in *Wong Sun, supra.* While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" [2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

*So ordered.*

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[2] See *Arlington Heights* v. *Metropolitan Housing Dev. Corp., ante,* at 270-271, n. 21.

# KNEBEL, SECRETARY OF AGRICULTURE *v.* HEIN

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

No. 75-1261. Argued November 29, 1976—Decided January 11, 1977*

Federal and state regulations that disallow a deduction for transportation expenses in connection with a job training program for purposes of computing the income of food stamp recipients *held* not to conflict with the Food Stamp Act of 1964 or to deny equal protection or due process. Pp. 292-297.

(a) Though under the Act's broad delegation of authority, the Secretary of Agriculture might have defined income in a variety of ways, his decision to adopt a definition of income including wages, welfare payments, training allowances, and other monetary receipts, with a 10% standardized deduction of the wages or training allowance (including tuition grants and travel allowances), and only a few specific deductions, is a valid exercise of his statutory authority. The availability of alternatives does not render the Secretary's choice invalid. Pp. 293-295.

(b) Allowing a specific deduction for items such as transportation expenses would significantly increase administrative costs as well as risks of disparate treatment. P. 295.

(c) Nothing in the Act requires that deductions include all necessary nonfood expenditures. Pp. 295-296.

(d) The regulations embody no conclusive presumption; they merely represent the reasonable judgments that (1) recipients of state travel allowances should be treated like other trainees and wage earners, and (2) the standard 10% deduction, coupled with the 30% ceiling on coupon purchase prices, provides an acceptable mechanism for dealing with ordinary expenses such as commuting. Pp. 296-297.

402 F. Supp. 398, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

*Stephen L. Urbanczyk* argued the cause *pro hac vice* for appellant in No. 75-1261. With him on the briefs were

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*Together with No. 75-1355, *Burns, Comm'r, Dept. of Social Services of Iowa, et al.* v. *Hein,* also on appeal from the same court.

*Solicitor General Bork, Assistant Attorney General Lee, Deputy Solicitor General Jones,* and *William Kanter. Lorna Lawhead Williams,* Special Assistant Attorney General of Iowa, argued the cause for appellants in No. 75–1355. With her on the briefs was *Richard C. Turner,* Attorney General.

*Robert Bartels,* by appointment of the Court, 426 U. S. 945, argued the cause and filed a brief for appellees in both cases.†

MR. JUSTICE STEVENS delivered the opinion of the Court.

Under the program administered by the Secretary of Agriculture and cooperating state agencies pursuant to the Food Stamp Act of 1964, 78 Stat. 703, 7 U. S. C. § 2011 *et seq.* (1970 ed. and Supp. V), certain low-income households are entitled to purchase food coupons at a discount. The price an eligible household must pay for food stamps is determined, in part, by its "income" as defined in the applicable federal and state regulations. Under those regulations a transportation allowance, which appellee receives from the State of Iowa and uses to defray the cost of commuting to a nurses' training program, is treated as "income." The questions presented on this appeal are whether those regulations are authorized by the statute and, if so, whether they are constitutional.

Appellee Hein, a divorced woman with custody of two children, is the head of a household receiving assistance.[1] Prior to September 1972, she paid only $46 for food stamps with a retail value of $92. Thereafter she received a grant from the State which paid her tuition at a nurses' training school, plus a transportation allowance of $44 per month.[2] The actual monthly expense of commuting between her residence in Muscatine, Iowa, and the school in Davenport amounted to at least $44.[3] The allowance nevertheless increased the "income" which determined the price of her food stamps,[4] resulting in a $12 price increase.

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†*Ralph Santiago Abascal, Lorelei Joy Borland,* and *Ronald F. Pollack* filed a brief for Sandra Chek et al. as *amici curiae* in both cases.

[1] It was stipulated that prior to November 28, 1973, Ms. Hein had no savings and only the following elements of income:

"a. $28.75 a month rent from a house in which she owns a part interest;

"b. $220 ADC;

"c. $44 Work and Training Allowance; and

"d. $36 food stamp bonus." App. 24–25.

After exhausting state administrative remedies, appellee filed a class action in the United States District Court for the Southern District of Iowa seeking to enjoin the enforcement of the Iowa regulations requiring that transportation allowances be included in income. Because the constitutionality of the regulations was challenged, a three-judge court was convened pursuant to 28 U. S. C. § 2281.[5] The District

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[2] This assistance was granted under the Iowa Work and Training Program, authorized by Iowa Code Ann. §§ 249C.1, *et seq.* (Supp. 1976). The program is partially funded by the State and partially by the Federal Government. Such funding is now provided under Title XX of the Social Security Act, 42 U. S. C. § 1397a *et seq.* (1970 ed., Supp. V).

[3] The record is actually somewhat unclear on this point. However, the District Court construed a stipulation regarding appellee's "allowance for necessary commuting" as indicating that she actually was required to spend that amount. For purposes of decision, we accept the District Court's construction. It should be noted, however, that if appellee was a full-time student, she would receive the full $44 even if her actual expenses were less. If she was a part-time student, she would be reimbursed on the basis of mileage, up to a maximum of $44 per month. The record does not disclose whether she was a full-time or part-time student.

[4] Under the regulations the tuition payment and the transportation allowance were both added to income. Then, an amount equal to the full tuition cost, plus 10% of the tuition payment and 10% of the transportation allowance, was deducted from income. The record does not disclose the tuition cost, or whether the proper deduction of 10% of that amount was made.

[5] The District Court defined the class represented by appellee to include all persons receiving transportation allowances pursuant to individual education and training plans whose allowances were included in, and not deducted from, income for purposes of determining the price they had to pay for food stamps. 371 F. Supp. 1091, 1093 n. 1 (1974).

Court originally held the Iowa regulation invalid as inconsistent with the regulations of the Secretary of Agriculture.[6] 371 F. Supp. 1091 (1974). While the State's appeal was pending in this Court, the Secretary promulgated a clarifying amendment eliminating the basis for the District Court's holding.[7] We therefore vacated the original judgment, 419 U. S. 989.

On remand, the Secretary of Agriculture was joined as an additional defendant. The District Court then held both the state and the federal regulations invalid. 402 F. Supp. 398 (1975). The court could identify no rational basis for treating as income a training allowance which is fully expended for its intended purpose. Consequently, the court reasoned, the regulation did not implement the statutory objective of providing adequate nutrition for low-income families. Since the allowance did not increase appellee's "food purchasing power," the District Court felt that it was totally irrational for the allowance to increase the cost of appellee's food stamps. This analysis led to the conclusion that the regulation conflicted with the Food Stamp Act and discriminated against recipients of transportation allowances in violation of the equal protection guarantee explicit in the Fourteenth Amendment and implicit in the Due Process Clause of the Fifth Amendment.[8]

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[6] Under 7 U. S. C. § 2014, state "plans of operation" submitted to the Secretary are not to be approved "unless the standards of eligibility meet those established by the Secretary." The Secretary's regulations set out the standards of eligibility which must be applied by the state agency. 7 CFR § 271.3 (c) (1976). The validity of the state regulations is at issue because they formed the direct basis for the change in appellee's food stamp price; the federal regulations are challenged because they now authorize the state regulations. See n. 7, *infra*.

[7] The clarifying amendment specifically precluded "deductions . . . for any other educational expenses such as . . . transportation." 7 CFR § 271.3 (c) (1) (iii) (f) (1976).

[8] The District Court ordered the defendants to cease including in income "any amount received . . . as reimbursement for necessary com-

We are persuaded that the statute authorized the Secretary and the State of Iowa to issue the challenged regulations and that the regulations are constitutional.

The salutary purpose and the broad outlines of the federal food stamp program are well known.[9] The Food Stamp Act authorizes the Secretary to "formulate and administer a food stamp program" which will provide an eligible household "an opportunity to obtain a nutritionally adequate diet," 7 U. S. C. § 2013 (a). He is to "prescribe the amounts of household income and other financial resources, including both liquid and nonliquid assets, to be used as criteria of eligibility," 7 U. S. C. § 2014 (b) (1970 ed., Supp. V). The charge for the coupons is to "represent a reasonable investment on the part of the household, but in no event more than 30 per centum of the household's income . . . ." § 2016 (b). Finally, the Secretary "shall issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program." § 2013 (c).

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muting expenses, pursuant to an Individual Education and Training Plan, unless such amount is deducted from such person's monthly net income in determining such person's adjusted net income." 402 F. Supp. 398, 408 (1975). The court also ordered defendants to recompute the amounts which members of the class should have paid for food stamps and to allow them a credit against future purchases in the amount of the past overcharge.

[9] "The federal food stamp program was established in 1964 in an effort to alleviate hunger and malnutrition among the more needy segments of our society. 7 U. S. C. § 2011. Eligibility for participation in the program is determined on a household rather than an individual basis. 7 CFR § 271.3 (a). An eligible household purchases sufficient food stamps to provide that household with a nutritionally adequate diet. The household pays for the stamps at a reduced rate based upon its size and cumulative income. The food stamps are then used to purchase food at retail stores, and the Government redeems the stamps at face value, thereby paying the difference between the actual cost of the food and the amount paid by the household for the stamps. See 7 U. S. C. §§ 2013 (a), 2016, 2025 (a)." *United States Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 529–530.

Under the statute's broad delegation of authority, the Secretary might have defined income in a variety of ways. He might, for example, have treated wages differently from training allowances. He decided, however, to adopt a definition of income which includes wages, welfare payments, training allowances, and most other monetary receipts.[10] Only a few specific deductions are allowed.[11] These deductions

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[10] The regulation provides, in part, that income includes:

"(*a*) All compensation for services performed as an employee . . . ."

"(*f*) Payments received from federally aided public assistance programs, general assistance programs, or other assistance programs based on need;

"(*g*) Payments received from Government-sponsored programs such as . . . the Work Incentive Program, or Manpower Training Program . . . ."

"(*i*) Cash gifts or awards . . . for support, maintenance, or the expenses of education . . . ."

"(*l*) Rents, dividends, interest, royalties, and all other payments from any source whatever which may be construed to be a gain or benefit . . . ." 7 CFR § 271.3 (c)(1)(i) (1976).

[11] The deductions which are relevant for present purposes are these:

"(*a*) Ten per centum of income from compensation for services performed as an employee or training allowance not to exceed $30 per household per month. This deduction shall be made before the following deductions . . . ."

"(*d*) The payments necessary for the care of a child or other persons when necessary for a household member to accept or continue employment, or training or education which is preparatory for employment . . . ."

"(*f*) Tuition and mandatory fees assessed by educational institutions (no deductions shall be made for any other education expenses such as, but not limited to, the expense of books, school supplies, meals at school, and transportation)." 7 CFR § 271.3 (c)(1)(iii) (1976).

These regulations have undergone change during the course of this litigation. The express exclusion of transportation expenses as a possible educational deduction was added in response to the District Court's holding at a prior stage of the litigation that such a deduction was required by the regulations. See *supra*, at 290-291. More recently, the system of itemized deductions set forth in the text was replaced by a standardized deduction for all households. 41 Fed. Reg. 18788 (1976). We are told that enforcement of the new regulations has been enjoined. Brief do not include any itemized deduction for commuting expenses of either students or workers. Instead, there is a standardized deduction of 10% of the wages or training allowance (including tuition grants and travel allowances), which is intended to cover incidental expenses.[12]

The District Court was correct that the regulations operate somewhat unfairly in appellee's case. Nevertheless, we are satisfied that they are the product of a valid exercise of the Secretary's statutory authority. Perhaps it might have been more equitable to allow a deduction for all commuting expenses,[13] or for the expenses of commuting to a training program, or—as the order of the District Court provides—just for such expenses covered by state transportation allowances. But the availability of alternatives does not render the Secretary's choice invalid.[14] Moreover, a

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for Appellant in No. 75-1261, p. 5 n. 3. This case would not become moot if the new regulations go into effect, because of the compensatory relief ordered by the District Court. See n. 8, *supra*.

[12] 7 CFR § 271.3 (c)(1)(iii)(*a*) (1976). A separate deduction is allowed for job- or training-related child-care expenses. 7 CFR § 271.3 (c)(1)(iii)(*d*) (1976).

[13] Deductions for such incidental expenses are allowed in calculating income from self-employment. See 7 CFR § 271.3 (c)(1)(i)(*b*) (1976). Appellee does not contend that the Secretary is required to take this approach with respect to wage earners. The statute before us, unlike that considered in *Shea* v. *Vialpando,* 416 U. S. 251, contains no indication that Congress meant to require individualized consideration of employment-related expenses. Given that the treatment of wage earners is valid, it follows that similar treatment of trainees is valid.

[14] The Court's recent comment on a regulatory choice made by the Federal Reserve Board in its administration of the Truth in Lending Act, 15 U. S. C. § 1601 *et seq.*, is relevant. In *Mourning* v. *Family Publications Serv., Inc.*, 411 U. S. 356, 371-372, the Court stated:

"That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Co.* v. *FPC,* 321 plainly acceptable reason exists for rejecting each of these possible alternatives.

Allowing a deduction for all transportation expenses would create significant administrative costs as well as risks of disparate treatment.[15] Disparate treatment of trainees and wage earners could be criticized as unfairly discriminating against the worker. Similar criticism can be leveled against the order entered by the District Court in this case, under which members of the class would fare better than workers with equally low receipts and equally high expenses.

The District Court's primary reason for invalidating the regulations was its view that transportation grants do not increase food purchasing power.[16] But the grant does give a household more food purchasing power than another household which receives no grant but incurs similar nondeductible

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U. S. 119, 124 (1944); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 236 (1936)."

[15] The record includes a letter dated March 11, 1974, from the Deputy General Counsel of the Department of Agriculture explaining the reasoning underlying a portion of the regulations. He stated:

"When these regulations were originally under consideration, it was administratively determined that tuition and mandatory fees are readily determinable, are uniform for all students, and are the primary costs of education (particularly college education) over and above a student's ordinary costs of living. It was also determined that the administrative burden of determining and verifying the expenses for the infinite variety of other outlays which may be incurred for education would be undue. Further, these other expenses, because of personal preference or otherwise, vary greatly from person to person and thus from household to household."

The fact that the Internal Revenue Code does not allow a deduction from income for commuting expenses lends support to the view that there is some reasonable basis for the Secretary's judgment in formulating these regulations. See *Commissioner* v. *Flowers*, 326 U. S. 465.

[16] For some full-time students who are members of the class this reasoning rests on a faulty premise; for them, the grant may exceed actual transportation expenses.

expenses related to training or employment. Moreover, nothing in the statute requires that deductions include all necessary nonfood expenditures. On the contrary, the requirement in § 2016 (b) that the price of the food stamps shall not exceed 30% of the household's income, assumes that 70% of that income may be expended on nonfood necessities.[17] Thus, there is a built-in allowance for necessary expenses beyond the specific deductions.[18]

We conclude that the federal regulations defining income were reasonably adopted by the Secretary in the performance of his statutory duty to "formulate and administer a food stamp program" and are therefore within the Secretary's statutory authority. Since there is no question about the constitutionality of the statute itself, the implementation of the statutory purpose provides a sufficient justification for both the federal regulations and the parallel state regulations to avoid any violation of equal protection guarantees. See, *e. g.*, *Weinberger* v. *Salfi*, 422 U. S. 749, 768–770; *Mathews* v. *De Castro, ante,* at 185. Nor do the regulations embody any conclusive presumption. They merely represent two reasonable judgments: first, that recipients of state travel allowances should be treated like other trainees and like wage earners; and second, that the standard 10% deduction, coupled with the 30% ceiling on coupon purchase prices, provides an acceptable mechanism for dealing with ordinary expenses such as commuting. The Constitution requires no more. See *Salfi*, *supra,* at 771–777.

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[17] We are informed that the "average purchase requirement for a food stamp household is now 24 percent of net income," Jurisdictional Statement in No. 75-1261, pp. 10-11, n. 3. See also 7 CFR § 271.10, App. A (1976).

[18] The District Court also believed that an exclusion from income was required by what it perceived to be the Act's policy favoring education. This policy was thought to be embodied in 7 U. S. C. § 2014 (c), which exempts bona fide students from the requirement that able-bodied adults register for work as a prerequisite to receiving food stamps. 402 F. Supp., at 405. This section expresses, if anything, only a policy that students and trainees not be treated less favorably than workers. Allowing trainees an exclusion for travel allowances would give them *more* favorable treatment than wage earners, who do not get a deduction for commuting expenses.

It is also contended that the regulations at issue work at cross-purposes with Title XX of the Social Security Act, which provides funding for the state program under which the travel allowance was paid. This contention is true only in the sense that the net benefit of the travel allowance is reduced by the increase in food stamp prices. But this is equally true of other government benefits, such as AFDC, which appellee concedes are properly included in income. Brief for Appellee 23-24. We find no indication that Congress intended different treatment for training allowances. Cf. 42 U. S. C. § 4636; *Hamilton* v. *Butz,* 520 F. 2d 709 (CA9 1975).

*Reversed.*

# BAYSIDE ENTERPRISES, INC., ET AL. v. NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1267. Argued November 10, 1976—Decided January 11, 1977

Petitioners, operating a large, vertically integrated poultry business (including breeding farms, chicken hatcheries, a slaughtering and processing plant, and a mill for producing poultry feed), contract with 119 independently owned and operated farms for the raising of chickens which are hatched in petitioners' hatcheries. Petitioners supply the farms with one-day-old chicks, their feed, medicine and supplies, and fuel, and pick up the chicks about nine weeks later when ready for slaughtering and processing. Petitioners retain title to the chicks at all times and pay the farmers a guaranteed sum plus a bonus based on poultry weight in exchange for the farmers' services in caring for and housing the chicks. The chicks are fed with feed from petitioners' feedmill delivered by truck drivers employed by petitioners specifically for this purpose. The petitioners refused to bargain collectively with a union representing these drivers, contending that the drivers were not employees as defined in § 2 (3) of the National Labor Relations Act but were exempted from protections of the Act as agricultural laborers by the related definition in § 3 (f) of the Fair Labor Standards Act. The union's resulting unfair labor practice charge was sustained by the National Labor Relations Board and the Court of Appeals on the ground that the truck drivers were not agricultural laborers because their duties were not incidental to petitioners' agricultural activities. *Held:* The drivers are "employees" within the coverage of the NLRA, not agricultural laborers, their status being determined by the character of the work that they perform for their employer, which work is not incidental to any of their employer's (petitioners') agricultural activities, the feedmill operation being nonagricultural and the storage and use of feed on the independent farms being agricultural activity performed by the independent farmers not by petitioners. The NLRB's conclusion that the truck drivers are employees is based on a reasonable interpretation of the NLRA, comports with the NLRB's prior holdings, and is supported by the Secretary of Labor's construction of § 3 (f). Pp. 299-304.

527 F. 2d 436, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

*Alan J. Levenson* argued the cause and filed a brief for petitioners.

*Harriet S. Shapiro* argued the cause for respondent. On the briefs were *Solicitor General Bork, John S. Irving, Carl L. Taylor, Norton J. Come,* and *Elinor Hadley Stillman.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The petitioners, collectively described as "Bayside," are three affiliated corporations operating a large, vertically integrated poultry business in Maine.[1] The question they present is whether six of their employees, who truck poultry feed from their feedmill to 119 farms on which their chickens are being raised, are "agricultural laborers" and therefore not covered by the National Labor Relations Act.

After a few preliminary talks, Bayside refused to bargain with the union representing these drivers on the ground that they were not "employees" within the meaning of the Act.[2] The union's resulting unfair labor practice charge was sustained by the National Labor Relations Board and the Court of Appeals for the First Circuit.[3] An apparent conflict with decisions of the Fifth and Ninth Circuits[4] led us to grant certiorari, 425 U. S. 970. We now affirm.

The protections of the National Labor Relations Act[5] extend only to "employees." Section 2 (3) of the Act, 29 U. S. C. § 152 (3), provides that the "term 'employee' . . . shall not include any individual employed as an agricultural laborer . . . ." Congress has further provided that the term "agricultural laborer" in the NLRA shall have the meaning specified in § 3 (f) of the Fair Labor Standards Act.[6] It is, therefore, that section and the decisions construing it which are relevant even though this proceeding arose under the NLRA.

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[1] Bayside Enterprises, Inc., and its wholly owned subsidiary Poultry Processing, Inc., are operating corporations; the subsidiary Penobscot Poultry Co. is apparently inactive.

[2] The drivers are represented by Truck Drivers, Warehousemen and Helpers Union, Local No. 340, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. That local and the Amalgamated Meatcutters Local 385 jointly represent employees in petitioners' processing plant.

[3] 216 N. L. R. B. 502, enf'd, 527 F. 2d 436 (1975). The Board's order requires Bayside to bargain with the union.

[4] *NLRB* v. *Strain Poultry Farms, Inc.,* 405 F. 2d 1025 (CA5 1969); *NLRB* v. *Ryckebosch, Inc.,* 471 F. 2d 20 (CA9 1972).

[5] 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*

Section 3 (f) provides, in relevant part:

> " 'Agriculture' includes farming in all its branches [including] the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations . . . ." 52 Stat. 1060, 29 U. S. C. § 203 (f).

This statutory definition includes farming in both a primary and a secondary sense.[7] The raising of poultry is primary farming, but hauling products to or from a farm is not primary farming. Such hauling may, however, be secondary farming if it is work performed "by a farmer or on a farm as an incident to or in conjunction with such farming operations . . . ." [7] Since there is no claim that these drivers work "on a farm," the question is whether their activity should be regarded as work performed "by a farmer." The answer depends on the character of their employer's activities.

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[6] Annually since 1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of "agricultural laborer" in § 2 (3) of the NLRA to § 3 (f) of the FLSA. The latest such rider (90 Stat. 23) provides in relevant part as follows:

"*Provided*, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2 (3) of the Act of July 5, 1935 (29 U. S. C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3 (f) of the Act of June 25, 1938 (29 U. S. C. 203) . . . ."

[7] "First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 762–763.

An employer's business may include both agricultural and nonagricultural activities. Thus, even though most of the operations on a sugar plantation are agricultural, persons employed in the plantation's sugar-processing plant are not "agricultural employees." *Maneja* v. *Waialua Agricultural Co.,* 349 U. S. 254, 264–270. In this case, both parties agree that some of Bayside's operations are agricultural and some are not.

The mill in which Bayside produces poultry feed and the processing plant in which it slaughters and dresses poultry are not agricultural operations.[8] On the other hand, the six farms on which it produces hatching eggs, and its activities in breeding and hatching chicks, are clearly agricultural in character. The parties are in dispute with respect to the character of Bayside's work related to the raising of the chickens.

The chickens are raised on 119 separate farms owned and operated by independent contractors. Pursuant to a standard contractual arrangement, Bayside provides each such farm with chicks, feed, medicine, fuel, litter, and vaccine. Bayside retains title to the chicks and pays the farmer a guaranteed sum, plus a bonus based on the weight of the bird when grown, in exchange for the farmer's services in housing and caring fcr the chicks. Bayside delivers the chicks to the independent farms when they are one day old and picks them up for processing about nine weeks later. During the nine-week period, the contract farmers feed the chicks with poultry feed delivered to their feedbins by Bayside drivers.

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[8] These operations are conducted by the subsidiary, Poultry Processing, Inc., which employs about 20 workers at its feedmill and about 380 at its processing plant in Belfast, Me.

Bayside argues that the activity on the independent farms is part of Bayside's farming operation. The argument is supported by the pervasive character of its control over the raising of the chicks, its ownership of the chicks, its assumption of the risks of casualty loss and market fluctuations, and its control over both the source and the destination of the poultry. In response, the Labor Board argues that the owners of the farms are independent contractors rather than employees of Bayside and therefore the farming activity at these locations is attributable to them rather than to Bayside.

The Labor Board has squarely and consistently rejected the argument that all of the activity on a contract farm should be regarded as agricultural activity of an integrated farmer such as Bayside.[9] This conclusion by the Board is one we must respect even if the issue might "with nearly equal reason be resolved one way rather than another." [10]

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[9] The Board has held that "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." *Imco Poultry*, 202 N. L. R. B. 259, 260 (1973), citing *Strain Poultry Farms, Inc.*, 160 N. L. R. B. 236 (1966); 163 N. L. R. B. 972 (1967), enf. denied, 405 F. 2d 1025 (CA5 1969); *Victor Ryckebosch, Inc.*, 189 N. L. R. B. 40 (1971), enf. denied, 471 F. 2d 20 (CA9 1972). Cf. *Norton & McElroy Produce, Inc.*, 133 N. L. R. B. 104 (1961).

[10] This is an instance of the kind contemplated by Mr. Justice Frankfurter in his concurrence in *Farmers Reservoir & Irrigation Co.*, *supra*, at 770:

"Both in the employments which the Fair Labor Standards Act covers and in the exemptions it makes, the Congress has cast upon the courts the duty of making distinctions that often are bound to be so nice as to appear arbitrary in relation to each other. A specific situation, like that presented in this case, presents a problem for construction which may with nearly equal reason be resolved one way rather than another."

Even if we should regard a contract farm as a hybrid operation where some of the agricultural activity is performed by Bayside and some by the owner of the farm, we would nevertheless be compelled to sustain the Board's order. For the activity of storing poultry feed and then using it to feed the chicks is work performed by the contract farmer rather than by Bayside. Since the status of the drivers is determined by the character of the work which they perform for their own employer, the work of the contract farmer cannot make the drivers agricultural laborers. And their employer's operation of the feedmill is a nonagricultural activity.[11] Thus, the Board properly concluded that the work of the truck drivers on behalf of their employer is not work performed "by a farmer" whether attention is focused on the origin or the destination of the feed delivery.

The Board's conclusion that these truck drivers are not agricultural laborers is based on a reasonable interpretation of the statute, is consistent with the Board's prior holdings,[12] and is supported by the Secretary of Labor's construction of § 3 (f).[13] Moreover, the conclusion applies to but one

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[11] The Board has found in comparable situations that delivery is incidental to the feedmill operation and therefore not an agricultural activity. *McElrath Poultry Co.,* 206 N. L. R. B. 354, 355 (1973), enf. denied, 494 F. 2d 518 (CA5 1974); *Samuel B. Gass,* 154 N. L. R. B. 728, 732–733 (1965), enf'd, 377 F. 2d 438 (CA1 1967).

[12] *Samuel B. Gass, supra; Strain Poultry Farms, Inc., supra; Victor Ryckebosch, Inc., supra; Abbott Farms, Inc.,* 199 N. L. R. B. 472 (1972), enf. denied, 487 F. 2d 904 (CA5 1973); *Imco Poultry, supra; McElrath Poultry Co., Inc., supra.*

[13] In 1961 the Wage and Hour Division of the Department of Labor issued an interpretative bulletin which remains effective today. It reads, in pertinent part:

"Contract arrangements for raising poultry.

"Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed specific instance of the "[m]yriad forms of service relationship, with infinite and subtle variations in the terms of employment, [which] blanket the nation's economy,"[14] and which the Board must confront on a daily basis. Accordingly, regardless of how we might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order.[15]

The judgment of the Court of Appeals is

*Affirmed.*

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dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3 (f). The activities of the feed dealer or processor, on the other hand, are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in 'secondary' agriculture (see §§ 780.137 et seq., [explaining that work must be performed in connection with the farmer-employer's own farming to qualify as 'secondary' agriculture by a farmer] and Johnston v. Cotton Producers Assn., 244 F. 2d 553)." 29 CFR § 780.126 (1975).

[14] *NLRB* v. *Hearst Publications,* 322 U. S. 111, 126. In that opinion, *id.,* at 131, the Court stated:

"But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker* v. *Motor Boat Sales,* 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (*Rochester Telephone Corp.* v. *United States,* 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." (Footnotes omitted.)

[15] Cf. *NLRB* v. *United Insurance Co.,* 390 U. S. 254, 260; *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 488; *NLRB* v. *Coca-Cola Bottling Co.,* 350 U. S. 264, 269.

# LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL. v. USERY, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-657. Argued November 30, 1976—Decided January 12, 1977

The provision of petitioner labor unions' constitution limiting eligibility for local union office to members who have attended at least one-half of the local's regular meetings for three years previous to the election of officers, *held* to violate § 401 (e) of the Labor-Management Reporting and Disclosure Act of 1959, which provides that every union member in good standing shall be eligible to be a candidate and to hold office, subject to "reasonable qualifications." Pp. 308-314.

(a) Where such meeting-attendance requirement resulted in the exclusion of 96.5% of petitioner local's members from candidacy for office, the requirement cannot be considered a "reasonable qualification" consistent with Title IV's goal of free and democratic union elections, since a requirement having that result restricts the free choice of the membership in selecting its leaders. P. 310.

(b) The requirement has a restrictive effect on union democracy even when considered as simply mandating a procedure to be followed by any member who wishes to be a candidate, rather than as excluding a category of members from eligibility for office, since it is probable that to require a member to decide upon a potential candidacy at least 18 months in advance of an election when no issues exist to prompt that decision may discourage candidacies and to that extent impair the general membership's freedom to oust incumbents in favor of new leadership. Pp. 310-311.

(c) Procedures that unduly restrict free choice among candidates are forbidden without regard to their success or failure in maintaining corrupt leadership, and hence it is immaterial whether or not it was shown that incumbent leaders of petitioner local became "entrenched" in their offices as a consequence of the operation of the meeting-attendance requirement. Pp. 311-312.

(d) The challenged requirement cannot be justified as encouraging attendance at union meetings, since it plainly has not served that goal. Nor can it be justified as assuring the election of knowledgeable and dedicated leaders, since Congress has determined that the best means to this end is open democratic elections, unfettered by unreasonable candidacy restrictions. P. 312.

(e) In using the term "reasonable qualifications" Congress clearly contemplated a flexible standard, which takes into account all the circumstances of a particular case, for determining the reasonableness of a meeting-attendance requirement. P. 313.

520 F. 2d 516, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post*, p. 314.

*Carl B. Frankel* argued the cause for petitioners. With him on the briefs were *Alfred E. Lawson, George H. Cohen, Michael H. Gottesman,* and *Bernard Kleiman.*

*John P. Rupp* argued the cause for respondent. On the brief were *Solicitor General Bork, Assistant Attorney General Lee, William F. Sheehan III, Leonard Schaitman, Eloise E. Davies, William J. Kilberg, Beate Bloch,* and *Marshall A. Deutsch.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Secretary of Labor brought this action in the District Court for the Southern District of Indiana under § 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 534, 29 U. S. C. § 482 (b), to invalidate the 1970 election of officers of Local 3489, United Steelworkers of America. The Secretary alleged that a provision of the Steelworkers' International constitution, binding on the Local, that limits eligibility for local union office to members who have attended at least one-half of the regular meetings of the Local for three years previous to the election (unless pre-

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**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

vented by union activities or working hours),[1] violated § 401 (e) of the LMRDA, 29 U. S. C. § 481 (e).[2] The District Court dismissed the complaint, finding no violation of the Act. The Court of Appeals for the Seventh Circuit reversed. 520 F. 2d 516 (1975). We granted certiorari to resolve a conflict among Circuits over whether the Steelworkers' constitutional provision violates § 401 (e).[3] 424 U. S. 907 (1976). We affirm.

## I

At the time of the challenged election, there were approximately 660 members in good standing of Local 3489. The Court of Appeals found that 96.5% of these members were ineligible to hold office, because of failure to satisfy the meeting-attendance rule.[4] Of the 23 eligible members, nine were incumbent union officers. The Secretary argues, and the Court of Appeals held, that the failure of 96.5% of the local members to satisfy the meeting-attendance requirement, and the rule's effect of requiring potential insurgent candidates to plan their candidacies as early as 18 months in advance of the election when the reasons for their opposition might not have yet emerged,[5] established that the requirement has a substantial antidemocratic effect on local union elections. Petitioners argue that the rule is reasonable because it serves valid union purposes, imposes no very burdensome obligation on the members, and has not proved to be a device that entrenches a particular clique of incumbent officers in the local.

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[1] Constitution of International Union, United Steelworkers of America, Art. VII, § 9 (c) (1968).

[2] This section provides, in pertinent part:

"(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. . . . The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title."

[3] The Steelworkers' attendance requirement was held not to violate § 401 (e) in *Brennan* v. *Steelworkers*, 489 F. 2d 884 (CA6 1973). Similar meeting-attendance requirements of other unions were found unreasonable in *Usery* v. *Transit Union*, 545 F. 2d 1300 (CA1 1976); *Brennan* v. *Teamsters*, 161 U. S. App. D. C. 173, 494 F. 2d 1092, 1099–1100 (1974); *Wirtz* v. *Bottle Blowers Assn.*, 405 F. 2d 176 (CA3 1968).

[4] Petitioners challenge this figure in this Court, but we cannot find it clearly erroneous. It is stipulated that of the approximately 660 members of the local, only 22 had attended enough meetings to qualify, and one additional member was found eligible by adding his excused

## II

The opinions in three cases decided in 1968 have identified the considerations pertinent to the determination whether the attendance rule violates § 401 (e). *Wirtz* v. *Hotel Employees,* 391 U. S. 492; *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463; *Wirtz* v. *Laborers' Union,* 389 U. S. 477.

The LMRDA does not render unions powerless to restrict candidacies for union office. The injunction in § 401 (e)

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absences to the meetings he attended. Petitioners now contend that other members may also have been eligible because of excused absences. In view of the admitted facts that the average attendance at meetings was only 47, and that the meetings were held in split day and evening sessions so that workers on any shift could attend, it seems unlikely that a significant number of workers could qualify by this method. In any event, petitioners introduced no evidence to suggest that members other than the above 23 were eligible, and the District Court, in its unpublished opinion, apparently accepted the Secretary's assertion that "in excess of 90%" of the local's membership was disqualified. In these circumstances, we cannot speculate that the findings of the courts below may have been materially inaccurate.

[5] Regular meetings were held on a monthly basis. Thus, in order to attend half of the meetings in a three-year period, a previously inactive member desiring to run for office would have to begin attending 18 months before the election.

that "every member in good standing shall be eligible to be a candidate and to hold office" is made expressly "subject to . . . reasonable qualifications uniformly imposed." But "Congress plainly did not intend that the authorization . . . of 'reasonable qualifications . . .' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording . . . ." *Wirtz* v. *Hotel Employees, supra,* at 499. The basic objective of Title IV of the LMRDA is to guarantee "free and democratic" union elections modeled on "political elections in this country" where "the assumption is that voters will exercise common sense and judgment in casting their ballots." 391 U. S., at 504. Thus, Title IV is not designed merely to protect the right of a union member to run for a particular office in a particular election. "Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Wirtz* v. *Bottle Blowers Assn., supra,* at 475; *Wirtz* v. *Laborers' Union, supra,* at 483. The goal was to "protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Wirtz* v. *Hotel Employees, supra,* at 497.

Whether a particular qualification is "reasonable" within the meaning of § 401 (e) must therefore "be measured in terms of its consistency with the Act's command to unions to conduct 'free and democratic' union elections." 391 U. S., at 499. Congress was not concerned only with corrupt union leadership. Congress chose the goal of "free and democratic" union elections as a preventive measure "to curb the possibility of abuse by benevolent as well as malevolent entrenched leadership." *Id.,* at 503. *Hotel Employees* expressly held that that check was seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents, and therefore held invalid the candidacy limitation there involved that restricted candidacies for certain positions to members who had previously held union office. "Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly be a 'reasonable qualification.'" *Id.*, at 502.

## III

Applying these principles to this case, we conclude that here, too, the antidemocratic effects of the meeting-attendance rule outweigh the interests urged in its support. Like the bylaw in *Hotel Employees*, an attendance requirement that results in the exclusion of 96.5% of the members from candidacy for union office hardly seems to be a "reasonable qualification" consistent with the goal of free and democratic elections. A requirement having that result obviously severely restricts the free choice of the membership in selecting its leaders.

Petitioners argue, however, that the bylaw held violative of § 401 (e) in *Hotel Employees* differs significantly from the attendance rule here. Under the *Hotel Employees* bylaw no member could assure by his own efforts that he would be eligible for union office, since others controlled the criterion for eligibility. Here, on the other hand, a member can assure himself of eligibility for candidacy by attending some 18 brief meetings over a three-year period. In other words, the union would have its rule treated not as excluding a category of member from eligibility, but simply as mandating a procedure to be followed by any member who wishes to be a candidate.

Even examined from this perspective, however, the rule has a restrictive effect on union democracy.[6] In the absence of a permanent "opposition party" within the union, opposition to the incumbent leadership is likely to emerge in response to particular issues at different times, and member interest in changing union leadership is therefore likely to be at its highest only shortly before elections.[7] Thus it is probable that to require that a member decide upon a potential candidacy at least 18 months in advance of an election when no issues exist to prompt that decision may not foster but discourage candidacies and to that extent impair the general membership's freedom to oust incumbents in favor of new leadership.

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[6] Petitioners argue that attendance at 18 relatively short meetings over three years is no very onerous burden on a union member. But this argument misconceives the evil at which the statute aims. We must

Nor are we persuaded by petitioners' argument that the Secretary has failed to show an antidemocratic effect because he has not shown that the incumbent leaders of the union became "entrenched" in their offices as a consequence of the operation of the attendance rule. The reasons for leaderships becoming entrenched are difficult to isolate. The election of the same officers year after year may be a signal that antidemocratic election rules have prevented an effective challenge to the regime, or might well signal only that the members are satisfied with their stewardship; if elections are uncontested, opposition factions may have been denied access to the ballot, or competing interests may have compromised differences before the election to maintain a front of unity. Conversely, turnover in offices may result from an open political process, or from a competition limited to candidates who offer no real opposition to an entrenched establishment. But Congress did not saddle the courts with the duty to search out and remove improperly entrenched union leaderships Rather, Congress chose to guarantee union democracy

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judge the eligibility rule not by the burden it imposes on the individual candidate but by its effect on free and democratic processes of union government. *Wirtz* v. *Hotel Employees*, 391 U. S., at 499.

[7] The Secretary suggests that in most unions there is no such organized opposition and that the pattern described in the text is indeed typical.

by regulating not the results of a union's electoral procedure but the procedure itself. Congress decided that if the elections are "free and democratic," the members themselves are able to correct abuse of power by entrenched leadership. Procedures that unduly restrict free choice among candidates are forbidden without regard to their success or failure in maintaining corrupt leadership.

Petitioners next argue that the rule is reasonable within § 401 (e) because it encourages attendance at union meetings, and assures more qualified officers by limiting election to those who have demonstrated an interest in union affairs, and are familiar with union problems. But the rule has plainly not served these goals. It has obviously done little to encourage attendance at meetings, which continue to attract only a handful of members.[8] Even as to the more limited goal of encouraging the attendance of potential dissident candidates, very few members, as we have said, are likely to see themselves as such sufficiently far in advance of the election to be spurred to attendance by the rule.

As for assuring the election of knowledgeable and dedicated leaders, the election provisions of the LMRDA express a congressional determination that the best means to this end is to leave the choice of leaders to the membership in open democratic elections, unfettered by arbitrary exclusions. Pursuing this goal by excluding the bulk of the membership from eligibility for office, and thus limiting the possibility of dissident candidacies, runs directly counter to the basic premise of the statute. We therefore conclude that Congress, in guaranteeing every union member the opportunity to hold office, subject only to "reasonable qualifications," disabled unions from establishing eligibility qualifications as sharply restrictive of the openness of the union political process as is petitioners' attendance rule.

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[8] Attendance at Local 3489's meetings averages 47 out of approximately 660 members. There is no indication in the record that this total represents a significant increase over attendance before the institution of the challenged rule.

## IV

Finally, petitioners argue that the absence of a precise statement of what the Secretary of Labor and the courts will regard as reasonable prevents the drafting of a meeting-attendance rule with any assurance that it will be valid under § 401 (e). The Secretary, to whom Congress has assigned a special role in the administration of the Act, see *Calhoon* v. *Harvey*, 379 U. S. 134, 140 (1964); *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975), has announced the following view:

> "Experience has demonstrated that it is not feasible to establish arbitrary guidelines for judging the reasonableness of [a meeting-attendance eligibility requirement]. Its reasonableness must be gauged in the light of all the circumstances of the particular case, including not only the frequency of meetings, the number of meetings which must be attended and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings, and the impact of the rule, i. e., the number or percentage of members who would be rendered ineligible by its application." 29 CFR § 452.38 (a) (1976).

Obviously, this standard leads to more uncertainty than would a less flexible rule. But in using the word "reasonable," Congress clearly contemplated exactly such a flexible result. Moreover, on the facts of this case and in light of *Hotel Employees*, petitioners' contention that they had no way of knowing that a rule disqualifying over 90% of a local's members from office would be regarded as unreasonable in the absence of substantial justification is unpersuasive.[9]

*Affirmed.*

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The petitioners' attendance rule, imposed by the constitution of the International Steelworkers' Union, provides that no member shall be eligible for election to a local union office unless he has attended one-half of the regular meetings of his local union during the preceding 36 months. The Court holds today, resolving a conflict among the Circuits, that this eligibility requirement is not reasonable within the meaning of § 401 (e) of Title IV of the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 481 (e). As this holding seems to me to be an unwarranted interference with the right of the union to manage its own internal affairs, I dissent.

Stated broadly, the purpose of Title IV of the Act is to insure "free and democratic" elections. But

> "[t]he legislative history [of the Act] shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs." *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463, 470–471 (1968); *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 496 (1968).

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[9] Also unpersuasive is the argument that a union cannot know in advance how many of its members will be disqualified by a meeting-attendance rule. While the precise number may not be predictable, petitioners must have had some awareness of the general attendance rate at union meetings, and if Local 3489's attendance rate is at all typical (and there is no contention that it is not), it should have been fairly obvious that a rule disqualifying all who had not maintained 50% attendance for three years, admittedly one of the most stringent such rules among labor unions, would have a significant antidemocratic impact.

Section 401 (e) reflects a congressional intent to accommodate both of these purposes. It provides that a labor organization may set "reasonable qualifications uniformly imposed" for members in good standing who wish to be candidates and to hold office. There is no contention that the attendance rule in question was not "uniformly imposed." Nor does the rule render ineligible for office any member who displays enough interest to attend half of his local's meetings.

The Court nevertheless, relying heavily on *Hotel Employees,* holds that this rule imposes an unreasonable qualification, violative of § 401 (e). *Hotel Employees* involved a "prior office" rule that limited candidates for local union office to members who previously had held elective union office. The Court's opinion in that case emphasized that the effect of the prior-office rule was to disqualify 93.1% of the union's membership. In this case, the respondent argues that *Hotel Employees* enunciated a *per se* "effects" rule, requiring invalidation of union elections whenever an eligibility rule disqualifies all but a small percentage of the union's membership. Although the Court today does not in terms adopt a *per se* "effects" analysis, it comes close to doing so. The fact that 96.5% of Local 3489's members chose not to comply with its rule was given controlling weight.

In my view, the Court has extended the reach of *Hotel Employees* far beyond the holding and basic rationale of that case. Indeed, the rule there involved was acknowledged to be a sport—"virtually unique in trade union practice." 391 U. S., at 505. It was a rule deliberately designed, as intimated by the Court's opinion, to entrench union leadership. *Id.,* at 499. Moreover, the general effect of the rule in *Hotel Employees* was predictable at the time the rule was adopted. By limiting eligibility to members who held or previously had held elective office, the disqualification of a large proportion of the membership was a purposeful and inevitable effect of the structure of the rule itself. The attendance rule before the Court today has no comparable feature. No member is precluded from establishing eligibility. Nor can the effect of the rule be predicted, as any member who demonstrates the requisite interest in union affairs is eligible to seek office. In short, the only common factor between the prior-office rule in *Hotel Employees* and that before the Court today is the similarity in the percentage of ineligible members. But in one case the effect was predetermined for the purpose of perpetuating control of a few insiders, whereas here the effect resulted from the free choice—perhaps the indifference—of the rank-and-file membership.

In *Brennan* v. *Steelworkers*, 489 F. 2d 884 (1973), the Court of Appeals for the Sixth Circuit sustained the validity of the identical rule at issue here. In distinguishing *Hotel Employees*, it said:

> "The self-evident restrictive character of the 'prior office holding' rule, when accompanied by the numerical effect of drastically limiting the number of eligible candidates for office, justifies the result in *Hotel Employees*. It is, however, erroneous to conclude, as the Secretary contends, that *Hotel Employees* commands blind adherence to a per se theory even where, as here, the rule does not by itself disqualify anyone and . . . does serve legitimate union objectives." 489 F. 2d, at 889.

The court went on to conclude that the purposes served by this attendance rule are legitimate.

Although the opinion of the Court today discounts the weight to be given these purposes, I agree with the Sixth Circuit that at least facially they serve legitimate and meritorious union purposes: (i) encouraging attendance at meetings; (ii) requiring candidates for office to demonstrate a meaningful interest in the union and its affairs; and (iii) assuring that members who seek office have had an opportunity to become informed as to union affairs. One may argue that requiring attendance at 18 of the 36 meetings prior to the election goes beyond what may be necessary to serve these purposes. But this is a "judgment call" best left to the unions themselves absent a stronger showing of potential for abuse than has been made in this case.

The record in this case is instructive. Twenty-three members were eligible to run for office in the 1970 election. These were members who were nominated and who also had complied with the attendance requirement. The record does not show, and indeed no one knows, how many members were eligible under the rule but who were not nominated. Three candidates competed for the office of president, four for the three trustee offices, and six ran unopposed for the remaining offices. Of the 10 officers elected, six were incumbents. Nonincumbents were elected to the offices of vice president, treasurer, recording secretary, and the minor office of guide. There was no history of entrenched leadership and no evidence of restrictive union practices precluding free and democratic elections. Indeed, the record is to the contrary. Five different presidents had been elected during the preceding 10 years, and an estimated 40 changes in officers had occurred in the course of four separate elections. Bernard Frye, who initiated this case by complaint to the Secretary, won the presidency in an election subsequent to 1970 and thereafter lost it.

In the final analysis, respondent, who bears the burden of proving that the rule is "unreasonable," rests his entire case on a facial attack upon the attendance rule itself, an attack supported by a statistical "effects test" that at best is ambiguous and one that could invalidate almost any attendance requirement that served legitimate union purposes. In my view, the respondent has failed to prove that the rule is unreasonable. For these reasons, I would reverse the judgment of the Court of Appeals.

# BOSTON STOCK EXCHANGE ET AL. *v.* STATE TAX COMMISSION ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 75-1019. Argued November 2, 1976—Decided January 12, 1977

A New York statute imposing a transfer tax on securities transactions, if part of the transaction occurs in New York, was amended in 1968 so that transactions involving an out-of-state sale are taxed more heavily than most transactions involving a sale within the State. The amendment provides for two deviations from the prior uniform application of the statute under which a transaction involving a sale and transfer of shares in New York was taxed the same as a transaction involving an in-state transfer but an out-of-state sale: (1) transactions by nonresidents of New York are afforded a 50% reduction in the tax rate when the transaction involves an in-state sale; and (2) the total tax liability of any taxpayer (resident or nonresident) is limited to $350 for a single transaction when it involves a New York sale. The purpose of the amendment was to provide relief from the competitive disadvantage thought to be created by the transfer tax for New York stock exchanges, as against out-of-state exchanges. Appellant "regional" stock exchanges brought action in state court against appellee State Tax Commission and its members challenging the constitutionality of the 1968 amendment under the Commerce Clause. The trial court denied the Commission's motion to dismiss, but on appeal the amendment was declared to be constitutional. *Held:* The amendment discriminates against interstate commerce in violation of the Commerce Clause. Pp. 328-337.

(a) No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business," *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450, 458. P. 329.

(b) Because it imposes a greater tax liability on out-of-state sales than on in-state sales, the transfer tax, as amended, falls short of the substantially evenhanded treatment demanded by the Commerce Clause, the extra tax burden on out-of-state sales neither compensating for a like burden on in-state sales nor neutralizing an economic advantage previously enjoyed by appellant exchanges as a result of the unamended statute. Pp. 329-332.

(c) The diversion of interstate commerce and diminution of free competition in securities sales created by the 1968 amendment are wholly inconsistent with the free trade purpose of the Commerce Clause. With respect to residents, the discriminatory burden of the maximum tax on out-of-state sales promotes intrastate transactions at the expense of interstate commerce to out-of-state exchanges. With respect to nonresidents, both the maximum tax and the rate reduction provisions discriminate against out-of-state sales, and the fact that this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce, does not save the amendment from Commerce Clause restrictions. Pp. 333–336.

37 N. Y. 2d 535, 337 N. E. 2d 758, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

*Roger Pascal* argued the cause for appellants. With him on the briefs was *Milton H. Cohen.*

*Robert W. Bush,* Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Solicitor General.

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case we are asked to decide the constitutionality of a recent amendment to New York State's longstanding tax on securities transactions. Since 1905, New York has imposed a tax (transfer tax) on securities transactions, if part of the transaction occurs within the State. In 1968, the state legislature amended the transfer tax statute so that transactions involving an out-of-state sale are now taxed more heavily than most transactions involving a sale within the State. In 1972, appellants, six "regional" stock exchanges located outside New York,[1] filed an action in state court against the State Tax Commission of New York and its members. The Exchanges' complaint alleged that the 1968 amendment unconstitutionally discriminates against interstate commerce by imposing a greater tax burden on securities transactions involving out-of-state sales than on transactions of the same magnitude involving in-state sales.[2] The State Supreme Court denied the Commission's motion to dismiss the action and the Commission appealed. The Appellate Division reversed and ordered that the Commission's motion be granted to the extent of entering a judgment declaring the 1968 amendment to be constitutional.[3] 45 App. Div.

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[1] Appellants are the Boston Stock Exchange, Detroit Stock Exchange, Pacific Coast Stock Exchange, Cincinnati Stock Exchange, Midwest Stock Exchange, and the PBW (Philadelphia-Baltimore-Washington) Stock Exchange. The Exchanges provide facilities for their members to effect the purchase and sale of securities for their own accounts and the accounts of their customers.

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[2] In the courts below the Exchanges also contended that the amendment to the transfer tax was unconstitutional under the Privileges and Immunities Clause of Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment. They have not brought those claims to this Court and we do not address them.

[3] The Commission's motion to dismiss was based on three grounds: (1) the state court lacked subject-matter jurisdiction, (2) the Exchanges did not have standing to question the constitutionality of the statute, and (3) the complaint failed to state a cause of action. All three state courts agreed that there was jurisdiction and standing, but the Appellate Division and the Court of Appeals dismissed the complaint on the merits because the statute was constitutional.

We agree, of course, that state courts of general jurisdiction have the power to decide cases involving federal constitutional rights where, as here, neither the Constitution nor statute withdraws such jurisdiction. We also agree that the Exchanges have standing under the two-part test of *Data Processing Service* v. *Camp,* 397 U. S. 150 (1970). Appellants' complaint alleged that a substantial portion of the transactions on their exchanges involved securities that are subject to the New York transfer tax, and that the higher tax on out-of-state sales of such securities diverted business from their facilities to exchanges in New York. This diversion was the express purpose of the challenged statute. See *infra,* at 325–328, and nn. 7, 10. The allegation establishes that the statute has caused them "injury in fact," and that a case or controversy exists. 397 U. S., at 151–152. The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are "arguably within the

2d 365, 357 N. Y. S. 2d 116 (1974). The New York Court of Appeals affirmed the order, 37 N. Y. 2d 535, 337 N. E. 2d 758 (1975), and we noted probable jurisdiction of the Exchanges' appeal, 424 U. S. 964 (1976).

## I

New York Tax Law § 270.1 (McKinney 1966) provides that "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock" in any foreign or domestic corporation are subject to the transfer tax.[4] Administrative regulations promulgated with respect to

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zone of interests to be protected . . . by the . . . constitutional guarantee in question." *Id.*, at 153. Moreover, the Exchanges brought this action also on behalf of their members. "[A]n association may have standing solely as the representative of its members . . . [if it] allege[s] that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth* v. *Seldin,* 422 U. S. 490, 511 (1975). See also *National Motor Freight Assn.* v. *United States,* 372 U. S. 246 (1963); *NAACP* v. *Alabama,* 357 U. S. 449, 458-460 (1958). The Exchanges' complaint alleged that their members traded on their own accounts in securities subject to the New York transfer tax. The members therefore suffer an actual injury within the zone of interests protected by the Commerce Clause, and the Exchanges satisfy the requirements for representational standing.

[4] After the decision by the New York Court of Appeals in this case, § 21 (2)(d) of the Federal Securities Acts Amendments of 1975 became effective. This amendment provides that no State may tax a change in beneficial or record ownership of securities if the change is effected through the facilities of a registered clearing house or registered transfer agent unless the change would otherwise be taxable if the facilities were not physically located in the taxing State. § 21 (2)(d), 89 Stat. 161, amending § 28 of the Securities Exchange Act of 1934, 15 U. S. C. § 78bb (d) (1970 ed., Supp. V). A transfer agent is defined in § 3 (6) of the 1975 amendments, 89 Stat. 100, amending § 3 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78c (a)(25) (1970 ed., Supp. V). Although the Senate Committee was unclear as to whether the New York transfer tax reached such changes in ownership, the Senate Report on the 1975 amendments indicates that § 21 (2)(d) was directed to New York's

the transfer tax provide that the tax applies if any one of the five taxable events occurs within New York, regardless of where the rest of the transaction takes place, and that if more than one taxable event occurs in the State, only one tax is payable on the entire transaction. 20 N. Y. C. R. R. 440.2 (1976). For transactions involving sales, the rate of tax depends on the selling price per share and the total tax liability is determined by the number of shares sold.[5] N. Y. Tax Law § 270.2 (McKinney 1966). Thus, under the unamended version of § 270, a transaction involving a sale and a transfer of shares in New York was taxed the same as a transaction involving an in-state transfer but an out-of-state sale. In both instances, the occasion for the tax was the occurrence of at least one taxable event in the State, the rate of tax was

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transfer tax in particular, and in general to similar taxes being considered by other States. S. Rep. No. 94–75, p. 60 (1975). See N. Y. Tax Law § 270.5(i)–(*l*) (McKinney Supp. 1976).

On December 1, 1975, counsel for the New York State Department of Taxation and Finance issued an opinion that the 1975 amendments limited the types of taxable events covered by § 270:

"[W]here the sole event in New York State is the delivery or transfer to or by a 'registered clearing agency' or a 'registered transfer agent,' as those terms are defined under the Securities Exchange Act of 1934, there is no stock transfer tax due and owing on and after December 1, 1975. However, where a sale, agreement to sell, memorandum of sale or any other delivery or transfer takes place in New York State, the stock transfer tax due and owing thereon must be paid." 2 CCH N. Y. Tax Rep. ¶ 57–101.605 (1976).

Although the new federal law may eliminate many transactions as taxable events under § 270, the constitutional questions raised by the Exchanges on this appeal still apply to the transactions that are taxable under § 270 after the 1975 amendments.

[5] The rates provided for in § 270.2 range from 1.25 cents per share when the sale price of the security is less than $5 to the highest rate of 5 cents per share when the price is $20 or more. When no sale is involved, *e. g.*, a gift, the rate is a constant 2.5 cents per share. In recent years, a 25% surcharge has been added to all transfer taxes. N. Y. Tax Law § 270–d (McKinney Supp. 1976).

based solely on the price of the securities, and the total tax was determined by the number of shares sold. The Exchanges do not challenge the constitutionality of § 270.[6]

None of the States in which the appellant Exchanges are located taxes the sale or transfer of securities. During the 1960's the New York Stock Exchange became concerned that the New York transfer tax created a competitive disadvantage for New York trading and was thus responsible for the growth of out-of-state exchanges.[7] In response to

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[6] Shortly after it was first enacted, the New York transfer tax was upheld against a challenge under the Fourteenth Amendment in *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152 (1907). The writ of error in *Hatch* did not challenge the constitutionality of the statute under the Commerce Clause, but both parties argued that issue before the Court. *Id.,* at 157. In response to those arguments, Mr. Justice Holmes observed only that the particular transaction involved was intrastate and that therefore the tax as applied to the party before the Court did not implicate the Commerce Clause. *Id.,* at 161-162. As to the question of whether the statute should fall because it would also be applied to interstate transactions, the Court found that the seller lacked standing to raise that claim. The Commerce Clause question was thus left undecided. *Id.,* at 160-161.

Thirty-three years later, the New York Court of Appeals held, in a 4-3 decision, that the transfer tax did not violate the Commerce Clause. *O'Kane* v. *State,* 283 N. Y. 439, 28 N. E. 2d 905 (1940). The challenge there was to a tax levy "upon an agreement for the sale of shares of stock which are to be sold and delivered across State lines." *Id.,* at 442, 28 N. E. 2d, at 906. The state court expressly noted that the tax, as then applied, was "a non-discriminatory State tax," and that "no discrimination was practiced on interstate commerce." *Id.,* at 444, 447, 28 N. E. 2d, at 907, 909. In the absence of discrimination, the tax was held not to be an undue burden on commerce.

[7] In a public statement on the proposed amendment to § 270, the president of the New York Stock Exchange explained the competitive problems of his organization and urged that the transfer tax be amended to help solve them:

"[T]he stock transfer tax has been the subject of extensive study by the City, State and the securities industry. These studies indicate that the New York securities markets have experienced increasing competitive this concern and fearful that the New York Stock Exchange would relocate outside New York, the legislature in 1968 enacted § 270-a to amend the transfer tax by providing for two deviations from the uniform application of § 270 when one of the taxable events, a sale, takes place in New York. First, transactions by nonresidents of New York are afforded a 50% reduction ("nonresident reduction") in the rate of tax when the transaction involves an in-state sale. Taxable transactions by residents (regardless of where the sale is made)[8] and by nonresidents selling outside the State do not benefit from the rate decrease. Second, § 270-a limits the total tax liability of any taxpayer (resident or nonresident) to $350 (maximum tax) for a single transaction when it involves a New York sale. If a sale is made out-of-State,

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problems in recent years from regional stock exchanges located in San Francisco, Los Angeles, Chicago, Detroit, Philadelphia and Boston. Some 88% of share trading on these exchanges is in New York Stock Exchange listed securities.

"From 1965 through 1967, the volume of trading on the regional exchanges increased by 73.2%. Regional 'cross' volume (a transaction on a regional exchange in which the broker finds both the buyer and seller) has increased by 202% in 1965-67. This indicates the loss of business by the New York markets to the regionals. As their volume continues to grow, a snowball effect develops. They become more competitive and are able to take more and more business away from New York. A loss of business to New York securities markets also means a loss of stock transfer tax revenue to New York City.

". . . However, the existing law can be amended in such a way as to ease the competitive disadvantage of the tax on New York securities markets and still preserve the revenue from the tax.

"Competitive problems are particularly acute in two areas—non-resident investors and large block transactions." Statement of Robert W. Haack, Mar. 4, 1968.

[8] The Exchanges do not challenge New York's authority to tax residents in a greater amount than nonresidents as long as the extent of the tax burden does not depend on an out-of-state sale.

the § 270 tax rate applies to an in-state transfer (or other taxable event) without limitation.[9]

The reason for the enactment of § 270-a and the intended

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[9] The nonresident reduction and the maximum tax of § 270-a initially involved a smaller disparity between in-state and out-of-state sales. The gap was gradually increased until the current rates took effect on July 1, 1973.

The relevant provisions of N. Y. Tax Law § 270-a (McKinney Supp. 1976) are as follows:

"1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.

"(a) On such sales by a nonresident during the periods set forth in the following table, the rates of tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

| "Period | "Percentage of Rates of Tax Provided in Section two hundred seventy of this article |
|---|---|
| "July 1, 1969 to June 30, 1970 | 95% |
| "July 1, 1970 to June 30, 1971 | 90% |
| "July 1, 1971 to June 30, 1972 | 80% |
| "July 1, 1972 to June 30, 1973 | 65% |
| "July 1, 1973 and thereafter | 50% |

. . . . .

"2. Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen huneffect of the amendment are clear from the legislative history. With respect to the amendment, the legislature found:

> "The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion

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dred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made within this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale."

> of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable." 1968 N. Y. Laws, c. 827, § 1.

In granting executive approval to § 270–a, then Governor Nelson Rockefeller confirmed that the purpose of the new law was to "provide long-term relief from some of the competitive pressures from outside the State." [10] The Gov-

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[10] In his memorandum of approval of the transfer tax amendment, Governor Rockefeller explained the changing competitive patterns in the securities industry and acknowledged that § 270–a was a response to these changes:

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is now studying sites for ernor announced that as a result of the transfer tax amendment the New York Stock Exchange intended to remain in New York.

Appellant Exchanges contend that the legislative history states explicitly what is implicit in the operation of § 270-a: The amendment imposes an unequal tax burden on out-of-state sales in order to protect an in-state business. They argue that this discrimination is impermissible under the Commerce Clause. Appellees do not dispute the statements of the legislature and the Governor that § 270-a is a measure to reduce out-of-state competition with an in-state business. They agree, however, with the holding of the Court of Appeals that the legislature has chosen a nondiscriminatory, and therefore constitutionally permissible, means of "encouraging" sales on the New York Stock Exchange. We hold that § 270-a discriminates against interstate commerce in violation of the Commerce Clause.

## II

As in *Great A&P Tea Co.* v. *Cottrell,* 424 U. S. 366 (1976), we begin with the principle that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327, 330 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit,* 329 U. S. 249, 252 (1946). The Commerce Clause does not, however, eclipse the reserved "power of the States to tax for the support of their own governments," *Gib-*

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a new exchange building in downtown Manhattan." Public Papers of Governor Nelson A. Rockefeller 553 (1968).

*bons* v. *Ogden,* 9 Wheat. 1, 199 (1824), or for other purposes, cf. *United States* v. *Sanchez,* 340 U. S. 42, 44–45 (1950); rather, the Clause is a limit on state power. Defining that limit has been the continuing task of this Court.

On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E. g., Freeman* v. *Hewit, supra,* at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.,* at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.* See also *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64 (1963); *Nippert* v. *Richmond,* 327 U. S. 416 (1946); *I. M. Darnell & Son* v. *Memphis,* 208 U. S. 113 (1908); *Guy* v. *Baltimore,* 100 U. S. 434, 443 (1880); *Welton* v. *Missouri,* 91 U. S. 275 (1876). The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356 (1951).

Although apparently accepting the teaching of the prior cases, the Court of Appeals seemed to view § 270–a as "compensatory legislation" enacted to "neutralize" the competitive advantage § 270 conferred on stock exchanges outside New York. Thus, it analogized the New York statute to state use taxes which have survived Commerce Clause challenges. 37 N. Y. 2d, at 542, 337 N. E. 2d, at 762. The statute will not support this characterization.

Prior to the 1968 amendment, the New York transfer tax was neutral as to in-state and out-of-state sales. An in-state transfer or delivery of securities triggered the tax and the burden fell equally on all transactions regardless of the situs of sale. Thus, the choice of an exchange for the sale of securities that would be transferred or delivered in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax.[11]

Section 270–a upset this equilibrium. After the amendment took effect, a nonresident contemplating the sale of securities that would be delivered or transferred in New York faced two possible tax burdens. If he elected to sell on an out-of-state exchange, the higher rates of § 270 applied without limitation on the total tax liability; if he sold the securities on a New York exchange, the one-half rate of § 270–a applied and then only up to a $350 tax liability. Similarly, residents engaging in large block transactions on the New York exchanges were subject to a maximum tax levy of $350; but if they sold out-of-State, their tax bill would be limited only by the number of shares sold. Thus, under § 270–a the choice of exchange by all nonresidents and by residents engaging in large transactions is not made solely on the basis of nontax criteria. Because of the delivery or transfer in New York, the seller cannot escape tax liability by selling out of State, but he can substantially reduce his liability by selling in State. The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than "compensating" New York for a supposed competitive disadvantage resulting from § 270, the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States.

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[11] Of course, the unamended § 270 did discourage sales in New York when no other taxable event would occur in that State, since out-of-state sales would not be taxed at all while in-state sales would be taxed at the full rate. Section 270–a, however, does not neutralize this competitive disadvantage of the New York exchanges. Although the reduced tax of the amendment decreases the disincentive to trade out of State, to the extent that any tax is imposed on transactions involving only an in-state sale, sales in New York are discouraged. Had New York sought to eliminate the only competitive edge enjoyed by the regional exchanges as a result of § 270, it could have done so without burdening commerce to its sister States by simply declaring that sales would not be a taxable event. Under that system, sellers who would not otherwise be liable for the tax would not incur liability by electing to sell on a New York exchange.

Equal treatment of interstate commerce, lacking in § 270–a, has been the common theme running through the cases in which this Court has sustained "compensating," state use taxes. In *Henneford* v. *Silas Mason Co.,* 300 U. S. 577 (1937), Washington imposed a 2% sales tax on all goods sold at retail in the State. Since the sales tax would have the effect of encouraging residents to purchase at out-of-state stores, Washington also imposed a 2% "compensating tax" on the use of goods within the State. The use tax did not apply, however, when the article had already been subjected to a tax equal to or greater than 2%. The effect of this constitutional tax system was nondiscriminatory treatment of in-state and out-of-state purchases:

> "Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order re-

> ceived directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local." *Id.*, at 584.

A similar use-sales-tax structure was sustained in *General Trading Co.* v. *Tax Comm'n,* 322 U. S. 335 (1944), because the "tax [was] what it professes to be—a nondiscriminatory excise laid on all personal property" regardless of where the sale was made. *Id.*, at 338. See also *International Harvester Co.* v. *Department of Treasury,* 322 U. S. 340 (1944); *Alaska* v. *Arctic Maid,* 366 U. S. 199, 204 (1961). In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax of the same amount. The taxes treated both transactions in the same manner.

Because it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax, as amended by § 270-a, falls short of the substantially evenhanded treatment demanded by the Commerce Clause. The extra tax burden on out-of-state sales created by § 270-a is not what the New York Court of Appeals holds it out to be; it neither compensates for a like burden on in-state sales, nor neutralizes an economic advantage previously enjoyed by the appellant Exchanges because of § 270.[12]

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[12] Because of the discrimination inherent in § 270-a, we also reject the Commission's argument that the tax should be sustained because it is imposed on a local event at the end of interstate commerce. While it is true that, absent an undue burden on interstate commerce, the Commerce Clause does not prohibit the States from taxing the transfer of property within the State, the tax may not discriminate between transactions on the basis of some interstate element. *International Harvester Co.* v. *Department of Treasury,* 322 U. S. 340, 347-348 (1944). As was held in *Welton* v. *Missouri,* 91 U. S. 275, 282 (1876): "[T]he commercial power

## III

The court below further attempted to save § 270–a from invalidation under the Commerce Clause by finding that the effect the amendment might have on sales by residents and nonresidents did not amount to unconstitutional discrimination. As to New York residents, the court found that the higher tax on large out-of-state sales would have no "practical" effect since "it is more than likely . . . that the sale would be made on a New York exchange in any event." 37 N. Y. 2d, at 543, 337 N. E. 2d, at 762. As to the discriminatory tax burden on all out-of-state sales by nonresidents, the court observed that because New York sales by nonresidents also involve interstate commerce, § 270–a does not discriminate against interstate commerce in favor of intrastate commerce; rather, it discriminates between two kinds of interstate transactions. *Ibid.* Although it did not so state, the Court of Appeals apparently believed that such discrimination was permissible under the Commerce Clause. We disagree with the Court of Appeals with respect to both residents and nonresidents.

The maximum tax discrimination against out-of-state sales by residents is not triggered until the taxed transaction involves a substantial number of shares. Investors, institutional and individual, engaging in such large-block transactions can be expected to choose an exchange on the basis of services, prices, and other market conditions rather than geographical proximity. Even a small difference in price (of either the securities or the sales services) can, in a large sale, provide a substantial enough additional profit to outweigh whatever additional transaction costs might be incurred from trading on an out-of-state exchange. The New York Leg-

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[of the Federal Government] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."

islature, in its legislative findings in connection with § 270-a, recognized that securities transactions by residents were not being conducted only on the New York exchanges; it therefore considered the amendment necessary to "[retain] within the state of New York . . . sales involving large blocks of stock." If, as the Court of Appeals assumed, it were "more than likely" that residents would sell in New York, there would have been no reason for the legislature to reduce the tax burden on in-state sales by residents in order to retain their sales in New York. Nor is the discriminatory burden of the maximum tax insubstantial. On a transaction of 30,000 shares selling at $20 or more, for example, the tax on an in-state sale is the maximum $350, while an out-of-state sale is taxed $1,500. The disparity between the two taxes increases with the number of shares sold. Such a large tax penalty for trading on out-of-state markets cannot be deemed to have no practical effect on interstate commerce.[13]

Both the maximum tax and the rate reduction provisions of § 270-a discriminate against out-of-state sales by nonresidents. The fact that this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce, see *Freeman* v. *Hewit,* 329 U. S., at 258-259, does not save § 270-a from the restrictions of the Commerce Clause. A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the Clause is to assure that there be free trade among the several States. This free trade purpose is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all state boundaries.

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[13] Even if we did not conclude that large-block sellers are likely to rely on economic rather than geographical factors in choosing an exchange, § 270-a would fall before the Commerce Clause. Whatever the current inclinations of New York investors, the Clause protects out-of-state businesses from any discriminatory burden on their interstate commercial activities. Even if the tax is not now the sole cause of New York residents' refusal to trade on out-of-state exchanges, at the very least it reinforces their choice of an in-state exchange and is an inhibiting force to selling out of State; that inhibition is an unconstitutional barrier to the free flow of commerce.

There has been no prior occasion expressly to address the question whether a State may tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses, but the clear import of our Commerce Clause cases is that such discrimination is constitutionally impermissible. *Guy* v. *Baltimore,* 100 U. S., at 443, held that no State, consistent with the Commerce Clause, may "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States"; and in *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511 (1935), New York was prohibited from regulating the price of out-of-state milk purchases because the effect of that regulation would be "to suppress or mitigate the consequences of competition between the states." *Id.,* at 522.[14] More recently, we noted that

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[14] *Baldwin* is particularly relevant to this case. After holding that the Commerce Clause prohibits obstructions to competition between the States, Mr. Justice Cardozo expressly rejected the proposition that such obstructions may be justified as measures to assure the economic health of local industry:

"If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

. . . . .

"The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in this "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145 (1970). Cf. *Halliburton Oil Well Co.* v. *Reily*, 373 U. S., at 72–73.

Although the statutes at issue in those cases had the primary effect of prohibiting or discriminatorily burdening a resident's purchase of out-of-state goods and services, the constitutional policy of free trade and competition that led to their demise is equally fatal to the New York transfer tax. New York's discriminatory treatment of out-of-state sales is made possible only because some other taxable event (transfer, delivery, or agreement to sell) takes place in the State. Thus, the State is using its power to tax an in-state operation as a means of "requiring [other] business operations to be performed in the home State." As a consequence, the flow of securities sales is diverted from the most economically efficient channels and directed to New York. This diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free trade purpose of the Commerce Clause.

## IV

Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share

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the long run prosperity and salvation are in union and not division." 294 U. S., at 522–523.

For the same reasons that *Baldwin* rejected New York's attempts to protect its dairy industry from competition from without, we now reject a similar attempt to protect New York's securities industry.

of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

The judgment of the New York Court of Appeals is reversed, and the case remanded for further proceedings not inconsistent with this opinion.[15]

*It is so ordered.*

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[15] When it enacted § 270-a, the New York Legislature also enacted a saving provision such that the invalidity of any part of the amendment should not affect the enforcement of any other part. It is not clear from the saving provision whether the legislature intended that the distinction between residents and nonresidents should survive the invalidation of the discrimination between in-state and out-of-state sales. Compare 1968 N. Y. Laws, c. 827, § 10 with § 11. Construction of the saving clause is, of course, a question of state law appropriately decided by the state courts.

# G. M. LEASING CORP. ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75-235. Argued October 4, 1976—Decided January 12, 1977

The Internal Revenue Service (IRS), having investigated the income tax liability of a taxpayer who was a fugitive from justice, determined deficiencies for two taxable years, and because of the taxpayer's failure to file proper returns and his fugitive status, made jeopardy assessments pursuant to § 6861 (a) of the Internal Revenue Code of 1954. Petitioner corporation was determined to be the alter ego of the taxpayer. Thereafter, pursuant to a decision to levy upon and seize automobiles registered in petitioner's name in partial satisfaction of the assessments against the taxpayer, agents made warrantless seizures of several such automobiles from property in which petitioner had no interest. For the purpose of levying on other property subject to seizure, they also went to petitioner's office, a cottage-type building, and made a warrantless forced entry. Pending further information as to whether the cottage was an office or a residence, the agents made no initial seizures, but two days later they again entered the cottage without a warrant and seized books, records, and other property. Thereafter petitioner, claiming that it was not the taxpayer's alter ego, that the assessment was invalid, and that the seizures of the automobiles and the contents of the office violated the Fourth Amendment, instituted this suit, seeking return of the automobiles, suppression of evidence obtained from the seized documents, and damages from the IRS agents. The District Court entered judgment for petitioner, finding that the IRS agents had committed illegal searches and seizures in violation of the Fourth Amendment. The Court of Appeals for the most part reversed, ruling that the assessments were valid, that the evidence conclusively established that petitioner was the taxpayer's alter ego, and that the warrantless searches and seizures were not unconstitutional. Section 6331 (a) of the 1954 Code authorizes the IRS to collect taxes "by levy upon all property and rights to property" belonging to a person who "neglects or refuses to pay" any tax, and § 6331 (b) defines "levy" as including "the power of distraint and seizure by any means." *Held:*

1. This Court granted certiorari limited to the Fourth Amendment issue and thus accepts the Court of Appeals' determinations that the assessments and levies were valid and that petitioner was the tax-

payer's alter ego. Petitioner does not challenge any other aspect of probable cause to believe that the items seized were properly subject to seizure, and therefore the only question before the Court is whether warrants were required. P. 351.

2. The warrantless automobile seizures, which occurred in public streets, parking lots, or other open areas, involved no invasion of privacy and were not unconstitutional. *Murray's Lessee* v. *Hoboken Land & Improv. Co.*, 18 How. 272. Pp. 351–352.

3. The warrantless entry into the privacy of petitioner's office violated the Fourth Amendment, since "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529. Pp. 352–359.

(a) Business premises are protected by the Fourth Amendment, and corporations have Fourth Amendment rights. The intrusion here was based, not on the nature of petitioner's business, its license, or regulation of its activities, but on the ground that its assets were seizable to satisfy tax assessments, which does not justify depriving petitioner of its Fourth Amendment rights simply because it is a corporation. Pp. 353–354.

(b) Neither the history of the common law and the laws in several States prior to the adoption of the Bill of Rights nor the case law since that time justifies creation of a broad exception to the warrant requirement for intrusions in furtherance of tax enforcement. Pp. 354–356.

(c) Section 6331 (b) must be read as authorizing only warrantless seizures as opposed to warrantless searches. Pp. 356–358.

(d) This case does not fall under the "exigent circumstances" exception to the warrant requirement, as is clear from the agents' own delay in making the entry in which the records were seized. Pp. 358–359.

4. Of the various remedy issues raised by petitioner, only the issue of damages against the individual agents need be addressed under the limited grant of certiorari and in the present posture of the case. Petitioner has shown violation of its constitutional rights. Whether, as the Government contends, petitioner is not entitled to money damages if the agents acted in good faith should be considered by the courts below in the light of all the facts, including IRS procedures based upon *Murray's Lessee*, *supra*, the existence of proof of any injury to petitioner resulting from the entry and temporary seizure of books and records, and the immunity issue reserved in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. Pp. 359–360.

514 F. 2d 935, affirmed in part, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post*, p. 361.

*Richard J. Leedy* argued the cause and filed briefs for petitioners.

*Solicitor General Bork* argued the cause for the United States et al. With him on the brief were *Assistant Attorney General Crampton, Stuart A. Smith, Leonard J. Henzke, Jr.,* and *Stephen M. Gelber.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

We granted certiorari in this case, 423 U. S. 1031 (1975), limited to the Fourth Amendment issue arising in the context of seizures of property in partial satisfaction of income tax assessments.[1]

## I

Petitioner G. M. Leasing Corp. is a Utah corporation organized in April 1972; among its stated business purposes is the leasing of automobiles. George I. Norman, Jr., although apparently not an incorporator, officer, or director of petitioner, was its general manager.

In 1971 Norman was tried and convicted in the United States District Court for the District of Colorado on two counts of aiding and abetting a misapplication of funds from a federally insured bank, in violation of 18 U. S. C. §§ 2 and 656. He was sentenced to two concurrent two-year terms of imprisonment. On appeal, his conviction was affirmed. *United States* v. *Cooper,* 464 F. 2d 648, 651–652 (CA10 1972). This Court denied certiorari. 409 U. S. 1107 (1973).

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[1] The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Norman and his wife, on November 15, 1971,[2] filed a joint income tax Form 1040 for the calendar year 1970 on which, apart from their names, address, social security numbers, occupations, and dependents, they indicated only that their tax for that year, "[e]stimated," was $280,000. The sum of $289,800 was transmitted when the form was filed and was placed by the Internal Revenue Service in a suspense account for future credit. Apart from the naked figure of estimated tax, the return contained no information as to income or deductions. App. 94.

The Normans also sought and were granted an extension of time within which to file their return for the calendar year 1971. A check for $405,125 was given to the Service on April 15, 1972, for application on their 1971 tax. This check evidently was dishonored. Although further extensions of time were granted, neither of the Normans ever filed a 1971 return.

In October 1972, after Norman's conviction was affirmed by the Tenth Circuit, the Service assigned the Norman account for 1970 and 1971 to Agent P. J. Clayton for investigation. Mr. Clayton, however, took no immediate action. *Id.*, at 66; Tr. of Oral Arg. 24–25.

In March 1973, after Norman's petition for a writ of certiorari had been denied, and after his petition for rehearing had also been denied, 410 U. S. 959 (1973), he surrendered to the United States Marshal for the serving of his sentence. By a ruse, however, he immediately disappeared. Tr. of Oral Arg. 6. Norman thereupon became a fugitive from justice; he was still one at the time of the oral argument. App. 15; Brief for Petitioners 5; Tr. of Oral Arg. 5–6.

Upon Norman's becoming a fugitive, the Service activated its investigation. On March 19, it determined deficiencies in Norman's income tax liability for 1970 and 1971 in the amounts of $406,099.34 and $545,310.59, respectively.[3] App. 95. These were based solely on information from third parties concerning the amount of stock sales Norman made through various brokerage houses. *Id.*, at 30, 67.[4] Because of Norman's failure to file appropriate returns and because of his fugitive status, collection of the taxes as so determined was regarded by the Service as in jeopardy; the deficiencies, therefore, were assessed forthwith pursuant to the authority granted by § 6861 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 6861 (a).[5]

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[2] Four extensions of time for filing had been granted. App. 99.

The following day revenue agents called at the Norman residence in Salt Lake City to endeavor to collect the taxes.

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[3] At the same time, the Service determined deficiencies in Mrs. Norman's income tax liability for 1970 and 1971 in the amounts of $69,265.04 and $84,873.50, respectively. *Id.*, at 96. Those deficiencies are not at issue in this case.

[4] Agent Clayton, called as a witness for the petitioner in the present case, on cross-examination answered "No" to the question whether he was "able to get any cooperation at all" from Mr. Norman. *Id.*, at 30. When later called as a witness on behalf of the respondents, Clayton also gave a negative answer to the question whether he had received "any information from the taxpayer or his accountant or representative." *Id.*, at 66.

Petitioner protests any adverse inference that might flow from this testimony and asserts that there is no evidence that Clayton requested assistance from Norman or his representatives who had filed powers of attorney with the Service. Reply Brief for Petitioners 3-4. Counsel for respondents at oral argument stated: "I want to correct any wrong implication if there is one, that they received no cooperation from Mr. Norman. . . . [N]obody had asked him prior to that time [his becoming a fugitive] for cooperation." Tr. of Oral Arg. 25.

[5] Jeopardy assessments of the determined deficiencies in Mrs. Norman's taxes were also made on March 19. App. 97.

The notice which is required after jeopardy assessment by § 6861 (b) of the Code enables the taxpayer to file a petition with the United States Tax Court for a redetermination of the deficiency. See *Laing* v. *United States*, 423 U. S. 161 (1976). A timely notice was sent to Norman, and a petition was filed on his behalf with the Tax Court. His case awaits trial there (Docket No. 6000-73).

Mrs. Norman answered the door. The agents informed her of the jeopardy assessments and demanded payment. No payment was forthcoming, and Mrs. Norman suggested that the agents get in touch with her attorney. App. 56. Thereafter, pursuant to their authority under § 6331 of the Code, the agents filed notice of tax liens with the Salt Lake County Recorder's Office and levied on a bank account of Norman. App. 95, 58.

While the agents were at the Norman residence, they observed automobiles parked in the driveway. Later, upon checking with the Utah Motor Vehicle Division, they learned that these vehicles were registered in the name of petitioner or in the name of another corporation owned by Norman, and that no automobile was registered in Norman's name or in that of his wife. *Id.*, at 73–74. They also learned that petitioner had no license to conduct business within Salt Lake County and had no telephone listing. *Id.*, at 74. It was further ascertained that, pursuant to the request of the Utah Department of Employment Security, petitioner had filed a Status Report. That report described the corporation's principal business activity as "Leasing Luxury Automobiles, Boats, etc." It recited that the corporation's "average number of employees" was zero and that it had paid no wages while it was in existence during the last three quarters of 1972 or thus far in 1973. *Id.*, at 91–92. On its Utah Sales and Use Tax Return for the second quarter of 1972, the corporation reported no sales. *Id.*, at 93. The agents regarded the automobiles seen at the Norman residence as "show" or "collector" cars and not the type "that would normally be used in a leasing business." *Id.*, at 74.

All these facts suggested to the agents that petitioner corporation was not engaged in any business activity but, instead, was Norman's alter ego and a repository of at least some of his personal assets. The agents consulted with the Service's Regional Counsel. With his concurrence, the conclusion was drawn that the assets of the corporation actually belonged to Norman. Accordingly, the decision was made to levy upon and seize automobiles titled in petitioner's name in partial satisfaction of the assessments against Norman. *Id.*, at 75–76.

On or about March 21, two days after the jeopardy assessments, revenue officers, without a warrant, seized several automobiles. Among them were a 1972 Stutz, a Rolls Royce Phantom V, a 1930 Rolls Royce Phantom I, two 1971 Stutzes, and a Jaguar. Three were taken at two different locations in Salt Lake City; two at the Century Plaza parking lot in Los Angeles, Cal.; and one near Norman's residence in Salt Lake City. *Id.*, at 121, 129; Tr. of Oral Arg. 13–14. None of the cars was on property in which petitioner had an interest. All were registered in petitioner's name. App. 75–76. The officers left a Chevrolet and a station wagon for the personal use of Mrs. Norman and her family.[6] *Id.*, at 58.

Also on March 21, revenue officers went to petitioner's office in Salt Lake County to levy on property subject to seizure, including the building itself. *Id.*, at 19. They had information that one, and possibly two, luxury automobiles might be there. Upon learning that a car was in the garage on the premises, they telephoned their superior, Bert Applegate, and asked him to come out to assist. *Id.*, at 77–79. The premises consisted of a cottage-type building and the garage. When Applegate arrived, a locksmith was there. He already had removed the lock from the garage door at the direction of the officers. A Stutz automobile was inside. The locksmith also had removed the lock on the cottage's rear door. *Id.,* at 80-81.

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[6] The two automobiles seized in Los Angeles were a two-door tan Stutz, valued at $30,000, and a four-door burgundy Stutz, valued at $100,000. They were financed by loans from Murray First Thrift. Following the levy, Murray foreclosed its own liens and arranged with Norman's attorney for the sale of the automobiles. App. 33, 122. It appears that the Government did not participate in those transactions and received no portion of the proceeds of the sales.

Applegate entered the cottage. He observed that its outward appearance was such that it could be a residence. He noticed a kitchen. He instructed the officers not to proceed with the seizure of any property there until the status of the cottage could be confirmed.[7] *Id.,* at 81, 23-24. The officers then left the cottage without taking anything, and its lock was replaced. *Id.,* at 82.

While the officers were in the cottage, Norman's son, George I. Norman III, age 19, and listed as a dependent on the 1970 Form 1040, appeared. He told the officers that the Stutz belonged to the petitioner corporation, and not to Norman. *Id.,* at 80, 34. He testified that he was living at the cottage "as security." *Id.,* at 34. He was asked to provide evidence as to the car's ownership. A decision was made not to seize the automobile at that time.

Information then came to Applegate, primarily from a Mr. Redd who was a contractor for Norman, that the cottage was a place of business and not a residence. *Id.,* at 79. In addition, there was activity at the cottage that night; the lights were on and boxes were being moved. The next morning the Stutz was not in the garage.[8] *Id.,* at 83. Sometime during the next two days, a decision was made to seize the cottage, its furnishings and any other assets there.[9] On

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[7] The Internal Revenue Service Manual, ¶ 5341.1, instructs that if an occupant of a private residence denies a revenue officer permission to enter, the officer should not attempt entry by force.

[8] The Service later found this particular automobile at another location. App. 83. It had been moved by Norman's son after the revenue agents had left on March 21. *Id.,* at 34.

[9] Title to the cottage was in the name of Real Estate, Inc., a corporation the Service determined to be the alter ego of Mrs. Norman. *Id.,* at 97. That corporation is not a party to the present suit and the relief petitioner requests does not include the return of the cottage.

March 23,[10] agents, acting without a warrant, and with the assistance of locksmiths and the equipment of a private van and storage firm, entered the cottage and removed its remaining contents, including furnishings and books and records. An inventory was made of the property so seized. The agents hoped to examine the books and records to see if they contained stock certificates or information concerning the location of other assets. The Regional Counsel, however, instructed them to pack the books and records, seal the boxes, and remove them to a safe storage place. *Id.*, at 83–88.

In May, petitioner corporation instituted this suit. By its amended complaint it asserted a claim for wrongful levy, with a request for the return of the automobiles; a claim for suppression of all evidence obtained from the seized documents; and a claim against the agents for damages. *Id.*, at 105–112. It alleged that the assessments were arbitrary and capricious, that petitioner was not an alter ego of Norman, and that the levy upon its premises and the contents violated the Fourth Amendment. *Ibid.*

Shortly thereafter, the Service returned to the cottage the originals of the records and documents that had been seized. In the meantime, however, they had been photocopied.[11] By a second amendment to petitioner's complaint, *id.*, at 124, punitive damages, among other relief, were requested.

Norman's son filed a complaint in intervention, *id.*, at 112–117, alleging essentially the same facts and requesting similar relief. The District Court allowed his intervention. The Government then filed a counterclaim seeking foreclosure of the tax liens against the property held in petitioner's name. *Id.*, at 127–134.

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[10] There is some evidence in the record that this took place on March 22 rather than March 23. *Id.*, at 34, 59, 77.

[11] The respondents in their brief state that while the case was pending on appeal to the Tenth Circuit the Service voluntarily destroyed all existing photocopies of the seized books and records. Brief for Respondents 16 n. 9, 76–77, and n. 43. Petitioner concedes that the seized documents have been returned and the photocopies destroyed. Tr. of Oral Arg. 14–15.

At the ensuing trial before the court without a jury there was testimony that Norman himself originally held title to some of the automobiles registered in petitioner's name, *id.*, at 37; that petitioner had no employees and did not lease any cars, *id.*, at 37, 39; that petitioner's only assets were luxury or vintage model automobiles; that the cars had not been transferred to it until at or near the end of 1972; and that petitioner never issued any stock, held any director's meetings, or engaged in any business.[12] *Id.*, at 43–45.

The District Court entered judgment for petitioner and for the intervenor. It found that the premises in question were the offices of petitioner and the residence of the intervenor; that the revenue-officer defendants had no search warrant; that they forcibly entered the premises on March 23 and again on March 25;[13] that they made the entry, search, and seizure "knowing full well that they were violating the rights" of petitioner, the intervenor, "and others"; that Agent Clayton committed the entry "maliciously"; that the defendants returned the books and records that had been seized but photocopied them and retained the photocopies; that the defendants levied upon and seized all the assets of petitioner, including seven automobiles and a bank account; that they disposed of two of the automobiles and stored the others in Salt Lake City; that the assessments of taxes, penalties, and interest against Norman and his wife for 1970 and 1971 were erroneous; that Norman and his wife had no liability for federal income tax, penalties, or interest for those years; that petitioner had "engaged in substantial business activity in preparation for its business purpose of leasing automobiles"; that it was not controlled solely by Norman or his wife; that it was not an alter ego of Norman or his wife; and that it was not their nominee. The court concluded that the revenue-officer defendants committed an illegal search and seizure of petitioner's offices and the intervenor's residence, in violation of the Fourth Amendment; that the photocopies of the seized books and records in the possession of the Service should be destroyed because any use of them would be illegal; that petitioner and the intervenor were entitled to general and punitive damages in amounts to be determined; that the Government's counterclaim should be dismissed with prejudice; that the Service should return all the seized assets of petitioner and of the intervenor; and that judgment should be awarded against the United States in favor of petitioner for the value of the two automobiles that had been sold. *Id.,* at 136–142. Judgment, including injunctive relief for the return of the automobiles and the books and records, and for the destruction of the photocopies, was entered accordingly. *Id.,* at 142–144.

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[12] There was conflicting testimony as to whether stock was issued. 1 Tr. 52–53.

[13] This date appears to be an error. See also n. 10, *supra*.

The Court of Appeals, for the most part, reversed. 514 F. 2d 935 (CA10 1975). It ruled that the evidence conclusively established that petitioner was Norman's alter ego so that its assets could be seized to satisfy Norman's income tax liability; that the District Court's finding to the contrary was clearly erroneous; that petitioner had not sustained its burden of proving the assessments to be erroneous; and that the trial court erred in invalidating the assessments and in dismissing the Government's counterclaim. In regard to the claim of illegal search and seizures, the Court of Appeals held:

> "The refusal to pay authorized appellants to collect the tax by levy, and this included the power of 'seizure by any means.' Thus appellants were acting pursuant to

> statute and did not commit an illegal search. The trial court's order returning the assets and suppressing the documents is improper." (Footnote omitted.) *Id.*, at 941.

The court also ruled that there was no evidence to support the trial court's finding that Clayton's participation "was of a malicious character." *Ibid.* In accord with a concession by the Government, the Court of Appeals affirmed the trial court's judgment insofar as it ordered the return of certain shares of stock to the intervenor.[14]

## II

A. Section 6331 (a) of the 1954 Code authorizes the Secretary or his delegate to collect taxes "by levy upon all property and rights to property" belonging to a person who "neglects or refuses to pay" any tax "or on which there is a lien . . . for the payment of such tax." [15] Section 6331 (b),

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[14] This portion of the judgment of the Court of Appeals affirming the trial court is not before us. Neither is any right of the intervenor at issue here. Tr. of Oral Arg. 13.

[15] Section 6331 reads in part:

"(a) Authority of Secretary or delegate.

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . . If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

"(b) Seizure and sale of property.

"The term 'levy' as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property pos-

and § 7701 (a)(21) as well, define "levy" as including "the power of distraint and seizure by any means." Both real estate and personal property, tangible and intangible, are subject to levy. Levy upon tangible property normally is effected by service of forms of levy or notice of levy and physical seizure of the property. Where that is not feasible, the property is posted or tagged. Because intangible property is not susceptible of physical seizure, posting, or tagging, levy upon it is effected by serving the appropriate form upon the party holding the property or rights to property. See Treas. Reg. § 301.6331-1 (a)(1), 26 CFR § 301.6331-1 (a)(1) (1976). See also *Phelps* v. *United States,* 421 U. S. 330, 335-337 (1975). And the Court has recognized that compulsion on the part of the Service occasionally is required in the enforcement of the revenue laws. See *United States* v. *Bisceglia,* 420 U. S. 141, 145 (1975). Indeed, one may readily acknowledge that the existence of the levy power is an essential part of our self-assessment tax system and that it enhances voluntary compliance in the collection of taxes that this Court has described as "the life-blood of government, and their prompt and certain availability an imperious need." *Bull* v. *United States,* 295 U. S. 247, 259 (1935).

Under § 6321 of the Code,[16] the assessments against Norman were a lien in favor of the United States upon all property

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sessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

[16] Section 6321 reads:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

belonging to Norman. If petitioner was Norman's alter ego, it had no countervailing effect for purposes of his federal income tax. *Griffiths* v. *Commissioner,* 308 U. S. 355 (1939); *Higgins* v. *Smith,* 308 U. S. 473, 476 (1940). It would then follow that the Service could properly regard petitioner's assets as Norman's property subject to the lien under § 6321, and the Service would be empowered, under § 6331, to levy upon assets held in petitioner's name in satisfaction of Norman's income tax liability. See *United States* v. *Plastic Electro-Finishing Corp.,* 313 F. Supp. 330, 333–334 (EDNY 1970), aff'd, 71–1 USTC ¶ 9421 (CA2 1971).

B. Our grant of certiorari was limited to the Fourth Amendment issue, and we declined to review petitioner's and Norman's son's claims that the assessments and levies should have been voided and that petitioner was not Norman's alter ego. Pet. for Cert. 2, 3.[17] We therefore approach this case accepting the Court of Appeals' determinations that the assessments and levies were valid and that petitioner was Norman's alter ego. Those facts necessarily establish probable cause to believe that assets held by petitioner were properly subject to seizure in satisfaction of the assessments. Petitioner does not claim that there was no probable cause to believe that the automobiles were held by petitioner, nor does it claim that there was no probable cause to believe that its offices would contain other seizable goods. There being probable cause for the search and seizures, the only questions before the Court are whether warrants were required to make "reasonable" either the seizures of the cars or the entry into and seizure of goods in the cottage.

C. The seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy. In *Murray's Lessee* v.

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[17] This effectuated a denial of the son's petition for certiorari.

*Hoboken Land & Improv. Co.*, 18 How. 272 (1856), this Court held that a judicial warrant is not required for the seizure of a debtor's land in satisfaction of a claim of the United States. The seizure in *Murray's Lessee* was made through a transfer of title which did not involve an invasion of privacy. The warrantless seizures of the automobiles in this case are governed by the same principles and therefore were not unconstitutional. See also *Hester* v. *United States*, 265 U. S. 57 (1924) (liquor seized in open field).[18]

D. The seizure of the books and records, however, involved intrusion into the privacy of petitioner's offices. Significantly, the Court has said:

> "[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search

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[18] If additional support were needed for this result, it is found in the Court's decisions sustaining the right of the Government to collect taxes by summary administrative proceedings. Thus, in *Bull* v. *United States*, 295 U. S. 247, 260 (1935), it was stated that a tax assessment "is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." See also *Cheatham* v. *United States*, 92 U. S. 85, 87-90 (1876); *State Railroad Tax Cases*, 92 U. S. 575, 612-615 (1876); *Graham* v. *DuPont*, 262 U. S. 234, 255 (1923). The rationale underlying these decisions, of course, is that the very existence of government depends upon the prompt collection of the revenues. In *Phillips* v. *Commissioner*, 283 U. S. 589, 596-597 (1931), the Court rejected a constitutional challenge to the statutory system under which taxes may be collected summarily without a pre-seizure judicial hearing. It was held that as long as there was an adequate opportunity for a post-seizure determination of the taxpayer's rights, the statute met the requirements of due process. See *Commissioner* v. *Shapiro*, 424 U. S. 614, 630-633 (1976); *Fuentes* v. *Shevin*, 407 U. S. 67, 91-92 (1972). These cases, of course, center upon the Due Process Clause rather than the Fourth Amendment, but the constitutional analysis is similar and yields a like result. It is to be noted that the Court in *Phillips*, 283 U. S., at 596, cited *Murray's Lessee* with approval as a case which sustained proceedings "more summary in character" and "involving less directly the obligation of the taxpayer."

> of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529 (1967).

See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454–455 (1971); *id.,* at 512 (White, J., concurring and dissenting); *Stoner* v. *California,* 376 U. S. 483 (1964); *United States* v. *Jeffers,* 342 U. S. 48 (1951); *McDonald* v. *United States,* 335 U. S. 451 (1948); *Agnello* v. *United States,* 269 U. S. 20 (1925).

The respondents do not contend that business premises are not protected by the Fourth Amendment. Such a proposition could not be defended in light of this Court's clear holdings to the contrary. *See* v. *City of Seattle,* 387 U. S. 541 (1967); *Go-Bart Co.* v. *United States,* 282 U. S. 344 (1931); *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920). Nor can it be claimed that corporations are without some Fourth Amendment rights. *Go-Bart Co.* v. *United States, supra; Silverthorne Lumber Co.* v. *United States, supra; Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 205–206 (1946); *Hale* v. *Henkel,* 201 U. S. 43, 75–76 (1906). Cf. *California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974); *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, 305–306 (1924); *Wilson* v. *United States,* 221 U. S. 361, 375–376 (1911); *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553–554 (1908).

The Court, of course, has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context. Thus, in *United States* v. *Biswell,* 406 U. S. 311 (1972), a warrantless search of a locked storeroom during business hours, pursuant to the inspection procedure authorized by the Gun Control Act of 1968, 18 U. S. C. § 923 (g), was upheld:

> "When a dealer chooses to engage in this pervasively

> regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." 406 U. S., at 316.

See also *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72 (1970) (Congress has broad authority to fashion standards of reasonableness for searches and seizures to regulate the liquor industry but failed in that case to authorize a warrantless search).

In the present case, however, the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. Rather, the intrusion is claimed to be justified on the ground that petitioner's assets were seizable to satisfy tax assessments. This involves nothing more than the normal enforcement of the tax laws, and we find no justification for treating petitioner differently in these circumstances simply because it is a corporation.

The respondents argue that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws. We recognize that the "Power to lay and collect Taxes" is a specifically enunciated power of the Federal Government, Const., Art. I, § 8, cl. 1, and that the First Congress, which proposed the adoption of the Bill of Rights, also provided that certain taxes could be "levied by distress and sale of goods of the person or persons refusing or neglecting to pay." Act of Mar. 3, 1791, c. 15, § 23, 1 Stat. 204. This, however, relates to warrantless seizures rather than to warrantless searches. It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.

Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance.[19] As Madison argued, urging the adoption of a Bill of Rights to restrain the Federal Government:

> "The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government." 1 Annals of Cong. 438 (1834 ed.).

The respondents urge that the history of the common law in England and the laws in several States prior to the adoption of the Bill of Rights support the view that the Fourth Amendment was not intended to cover intrusions into privacy in the enforcement of the tax laws. We do not find in the cited materials anything approaching the clear evidence that would be required to create so great an exception to the Fourth Amendment's protections against warrantless intrusions into privacy.

The respondents also rely upon certain dicta in *Boyd* v. *United States,* 116 U. S. 616 (1886) [20] (subpoena of private

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[19] See T. Taylor, Two Studies in Constitutional Interpretation 41 (1969); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51-78 (1937); J. Landynski, Search and Seizure and the Supreme Court 30-42 (1966).

[20] In *Boyd,* the Court stated:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different papers impermissible). But see *Fisher* v. *United States*, 425 U. S. 391, 408–411 (1976), and *Andresen* v. *Maryland*, 427 U. S. 463, 471–472 (1976). We do not find in *Boyd* any direct holding that the warrant protections of the Fourth Amendment do not apply to invasions of privacy in furtherance of tax collection. Insofar as language in *Boyd* might be read so to state, we decline to follow those dicta into rejection of the basic governing principle that has shaped Fourth Amendment law.

Finally, the respondents argue that warrantless searches are justified by congressional enactment, as were the searches in *Biswell* and *Colonnade*. The statute, § 6331 (b) of the Code, 26 U. S. C. § 6331 (b), authorizes "distraint and seizure by any means." See n. 15, *supra*. Read narrowly, it au-

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things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him." 116 U. S., at 623.

The Court's concern in *Boyd* was with establishing the impermissibility of the subpoena of papers. It was not concerned with the warrant requirement for entry into private places. The Court, however, did say:

"The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels *by virtue of a judicial writ*, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution." *Id.*, at 624 (emphasis added).

The Court was not concerned with, and therefore did not explain, whether the "judicial writ" referred to above was necessary in order to meet the warrant requirements. The opinion does describe the "obnoxious writs of assistance" against which the Fourth Amendment was designed to protect. This description gives an indication of the types of tax-enforcement actions that the Amendment's protections were intended to reach:

"Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods." (Footnote omitted.) *Id.*, at 623.

thorizes the use of every means to deprive the taxpayer of use, enjoyment, or title to property (*e. g.*, transferring title, asportation, immobilization). It does not refer to warrantless intrusions into privacy. The respondents, however, would have us read the statute to authorize such warrantless intrusions. They assert that a statute of that kind is permissible in light of the considerations discussed in *Camara* and *See*. Examination of the statute shows that quite the opposite is true.

The respondents recognize that one of the Court's critical concerns in *Camara* and *See* was the discretion of the seizing officers. Brief for Respondents 66. Yet § 6331 clearly gives the Secretary or his delegate discretion as to what property to seize. If more than one location is involved, the Secretary will choose which dwelling will be invaded. If property is to be found both in public places and in private areas, the Secretary may choose which to seize. This hardly can be called a restraint on discretion. The respondents also recognize the concern with the existence of questions of disputed fact. They argue that in the seizure situation there are no such questions; yet in the present case the agents' confusion over whether the premises were an office or a residence demonstrates the contrary.

The respondents assert that the burden on the Government of obtaining a warrant is a relevant factor. Brief for Respondents 67–68. They suggest that the burden is great here because the Government is dealing with persons who may attempt to put their property beyond reach. Yet the statute authorizes distraint and seizure whenever a taxpayer *neglects* or refuses to pay his tax, and regardless of any indication of risk of concealment. The statute simply does not focus on situations involving a need for rapid action.

The respondents argue that the interest in the collection of taxes is such as to bring this case within the reasoning of *Biswell* and *Colonnade*. Those cases involved voluntary participation in a highly regulated activity. Section 6331, however, covers all defaults on all taxes, and we are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring *per se* exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure.

The respondents suggest that the privacy interest in business premises is less than that in a private home. Even if correct, the assertion is irrelevant with respect to the intent of the statute, for the statute makes no distinction between business properties and dwelling areas. If it authorizes entries at all, it authorizes entries into both business premises and private homes.

The respondents offer no legislative history in support of their reading of § 6331, and to give the statute that reading would call its constitutionality into serious question. We therefore decline to read it as giving *carte blanche* for warrantless invasions of privacy. Rather, we give it its natural reading, namely, as an authorization for all forms of *seizure,* but as silent on the subject of intrusions into privacy.

The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U. S., at 528-529.

As an alternative to their argument that a new exception to the warrant requirement should be recognized, the respondents assert that the facts of this case bring it within the "exigent circumstances" exception to the warrant requirement.[21] The agents' own actions, however, in their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, are sufficient to support the District Court's implicit finding that there were no exigent circumstances in this case.

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[21] There is no claim that any other exception to the warrant requirement, such as "hot pursuit," "plain view," or "pursuant to an arrest," is applicable here.

We therefore conclude that the warrantless entry into petitioner's office was in violation of the commands of the Fourth Amendment.

## III

This takes us to the issue of remedy. Specifically, petitioner, by its second amended complaint, prayed for (a) the return of the photocopies of the books and records; (b) the return of the automobiles; (c) a declaration that petitioner is not the alter ego of Norman or of Mrs. Norman; (d) the suppression of all evidence obtained from the books and records; (e) the suppression of the automobiles as evidence; (f) the release of all levies; and (g) general and punitive damages against the individual defendant-agents. App. 123–124.

The alter ego issue, as has been noted, was denied review. The books and records were returned, and the photocopies concededly have been destroyed; that claim, thus, is moot. We have decided the issue of the legality of the seizure of the automobiles adversely to petitioner. The suppression issue, as to the books and records, obviously is premature and may be considered if and when proceedings arise in which the Government seeks to use the documents or information obtained from them. See *Meister* v. *United States,* 397 F. 2d 268, 269 (CA3 1968); *Hill* v. *United States,* 346 F. 2d 175 (CA9), cert. denied, 382 U. S. 956 (1965). And the irreparable injury required to support a motion to suppress, under Fed. Rule Crim. Proc. 41 (e), on equitable grounds in advance of any proceedings, has not been demonstrated. *Hunsucker* v. *Phinney*, 497 F. 2d 29, 34 (CA5 1974), cert. denied, 420 U. S. 927 (1975).

This leaves only the issue of damages against the individual agents. The District Court found that Agent Clayton "maliciously committed said forced entry, and search and seizure," App. 138, and concluded that he and other individual defendants acted "knowing full well that they were violating the rights of" petitioner. *Ibid.* It concluded that petitioner was entitled to judgment for those actions. The Court of Appeals, in the context of its holding that the entry and search were not illegal, ruled that the finding of maliciousness on the part of Clayton was unsupported by any evidence in the record and was clearly erroneous. 514 F. 2d, at 940–941. It also reversed the judgment awarding petitioner damages. *Id.*, at 942.

We have held above, however, that a warrant should have been obtained, under the circumstances of this case, before the forcible entry was effected. This brings into focus and for consideration this Court's decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and the reservation there of the immunity question. The Government suggests that, assuming a violation of the Fourth Amendment by the agents, petitioner is not entitled to money damages if the agents acted in good faith; that good faith was supported by the "apparent fact" that the agents' conduct was in conformity with standard Service procedures based upon *Murray's Lessee, supra;* and that the record justifies the conclusion that the agents acted in good faith. That may well be, but we conclude that this aspect of the facts, the existence of proof of any injury to petitioner resulting from the entry and the temporary seizure of the books and records, and the immunity issue all should be addressed in the first instance by the Court of Appeals and, if it so directs, by the District Court.

The judgment of the Court of Appeals is therefore affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. CHIEF JUSTICE BURGER, concurring.

While I concur in the opinion of the Court, it may be useful to note that the factual setting of this case provides what seems, to me, a classic illustration of the dividing line between an impermissible, warrantless entry and one permissible under the "exigent circumstances" exception to the Fourth Amendment warrant requirement.

After their initial entry into, and retreat from, the petitioner's office-cottage, the IRS agents assigned to the investigation of the fugitive Norman's tax liability placed the premises under 24-hour surveillance. One night during the course of this surveillance, the agents observed cartons and other materials being removed from the premises by persons unknown to them. Against the background facts, such surreptitious nighttime activity constituted an exigent circumstance that would have justified an *immediate* seizure of the materials being moved in order to protect the interests of the United States. This is especially so since here the premises were controlled by the alter ego of an individual who was not only a delinquent taxpayer, but who was, at the time, a fugitive from justice. Rather than acting immediately, however, the agents chose to wait for approximately a day and a half to two days before making their entry. I agree with the conclusion that there were no exigent circumstances on these facts; however, the Court holds no more than that the agents' *delay* after observing these highly suspicious events makes that exception to the warrant requirement unavailable to them. By failing to act at once, the exigency was dissipated, and I do not understand our opinion to imply, in any way, that the removal of cartons, which could reasonably have contained relevant records needed by the Government, would not have been an exigent circumstance permitting immediate seizure without the warrant required by the Fourth Amendment.

# OREGON EX REL. STATE LAND BOARD v. CORVALLIS SAND & GRAVEL CO.

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 75-567. Argued October 4, 1976—Decided January 12, 1977*

This litigation involves a dispute between the State of Oregon and an Oregon corporation over the ownership of two portions of land underlying the Willamette River, which is navigable but not an interstate boundary. The first portion has been within the riverbed since Oregon's admission into the Union, while the second portion is in an area that was not part of the riverbed at the time of Oregon's admission but later became part of the riverbed because of changes in the river's course. In an ejectment action brought by Oregon against the corporation, which had been digging in the disputed part of the riverbed for 40 to 50 years without a lease from the State, the trial court awarded the first portion to the State on the ground that it had acquired sovereign title thereto upon admission into the Union and had not conveyed it, but with respect to the second portion found that avulsion, rather than accretion, had caused the changes in the river channel and that therefore the title to the land remained in the corporation, its original owner before it became riverbed. The Oregon Court of Appeals affirmed, taking the view that it was bound to apply federal common law to the resolution of the dispute by *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313, and accordingly holding that the trial court's award of the second portion to the corporation was correct either under the theory of avulsion or under an exception to the accretion rule, and that preservation of the State's interest in navigation, fishing, and other related goals did not require that it acquire ownership of the new riverbed. The Oregon Supreme Court affirmed, with certain modifications dealing only with a factual question regarding the length of the second portion. *Held:* The disputed ownership of the riverbed lands should be decided solely as a matter of Oregon law and not by federal common law, since application of federal common law is required neither by the equal-footing doctrine nor by any other principle of federal law. If the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent

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*Together with No. 75-577, *Corvallis Sand & Gravel Co.* v. *Oregon ex rel. State Land Board,* also on certiorari to the same court.

dispositions. A similar result obtains in the case of riparian lands which did not pass under that doctrine; state law governs issues relating to such property, like other real property, unless some other principle of federal law requires a different result. *Bonelli Cattle Co., supra,* was wrong in treating the equal-footing doctrine as a source of federal common law after the doctrine had vested title to the riverbed in question in that case in the State of Arizona as of the time of its admission into the Union, and accordingly that case's application of federal common law to cases such as the instant one is overruled. Pp. 368–382.

272 Ore. 545, 536 P. 2d 517; 272 Ore. 550, 538 P. 2d 70, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting statement, *post,* p. 382. MARSHALL, J., filed a dissenting opinion, in which WHITE, J., joined, *post,* p. 382.

*Peter S. Herman* argued the cause for petitioner in No. 75–567 and for respondent in No. 75–577. With him on the briefs were *Lee Johnson,* Attorney General of Oregon, and *W. Michael Gillette,* Solicitor General.

*Robert Mix* argued the cause and filed briefs for respondent in No. 75–567 and for petitioner in No. 75–577.

*Russell Iungerich,* Deputy Attorney General of California, argued the cause for the State of California et al. as *amici curiae* in both cases. With him on the brief were *Evelle J. Younger,* Attorney General, *Sanford N. Gruskin,* Chief Assistant Attorney General, *N. Gregory Taylor,* Assistant Attorney General, and *Jerold A. Krieger,* Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *William J. Baxley* of Alabama, *Avrum Gross* of Alaska, *Robert L. Shevin* of Florida, *Arthur K. Bolton* of Georgia, *Ronald Amemiya* of Hawaii, *Wayne L. Kidwell* of Idaho, *Theodore L. Sendak* of Indiana, *Richard C. Turner* of Iowa, *William J. Guste, Jr.,* of Louisiana, *Francis B. Burch* of Maryland, *Warren R. Spannaus* of Minnesota, *A. F. Summer* of Mississippi, *Robert L. Woodahl* of Montana, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *William F. Hyland* of New Jersey, *Allen I. Olsen* of North Dakota, *Daniel R. McLeod* of South Carolina, *William Janklow* of South Dakota, *John L. Hill* of Texas, *Andrew P. Miller* of Virginia, and *Chauncey H. Browning, Jr.*, of West Virginia.†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This lawsuit began when the State of Oregon sued Corvallis Sand & Gravel Co., an Oregon corporation, to settle the ownership of certain lands underlying the Willamette River. The Willamette is a navigable river, and this land is located near Corvallis, Oregon. The river is not an interstate boundary.

Corvallis Sand had been digging in the disputed part of the riverbed for 40 to 50 years without a lease from the State. The State brought an ejectment action against Corvallis Sand, seeking to recover 11 separate parcels of riverbed, as well as damages for the use of the parcels. The State's complaint alleged that by virtue of its sovereignty it was the owner in fee simple of the disputed portions of the riverbed, and that it was entitled to immediate possession and damages. Corvallis Sand denied the State's ownership of the bed.

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†*Slade Gorton*, Attorney General, and *Joseph Lawrence Coniff, Jr.*, Assistant Attorney General, filed briefs in both cases for the State of Washington as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed in both cases by *Vernon B. Romney*, Attorney General of Utah, *Robert B. Hansen*, Deputy Attorney General, *Dallin W. Jensen*, Assistant Attorney General, *Richard L. Dewsnup*, Special Assistant Attorney General, *Toney Anaya*, Attorney General of New Mexico, and *Paul L. Bloom*, Assistant Attorney General, for the States of Utah et al.; and by *K. J. Gilly* and *Jack C. Caldwell* for Dow Chemical Co. et al.

Each party was partially successful in the Oregon courts,[1] and we granted cross petitions for certiorari. 423 U. S. 1048. Those courts understandably felt that our recent decision in *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973), required that they ascertain and apply principles of federal common law to the controversy. Twenty-six States have joined in three *amicus* briefs urging that we reconsider *Bonelli, supra,* because of what they assert is its significant departure from long-established precedent in this Court.

## I

The nature of the litigation and the contentions of the parties may be briefly stated. Title to two distinct portions of land has been at issue throughout. The first of these portions has apparently been within the bed of the Willamette River since Oregon's admission into the Union.

The other portion of the land underlies the river in an area known as Fischer Cut, which was not a part of the riverbed at the time Oregon was admitted to the Union. The trial court found that prior to a flood which occurred in November 1909, the Willamette flowed around a peninsula-like formation known as Fischer Island, but that by 1890 a clearly discernible overflow channel across the neck of the peninsula had developed. Before 1909 this channel carried the flow of the river only at its intermediate or high stages, and the main channel of the river continued to flow around Fischer Island. But in November 1909, a major flood, in the words of the Oregon trial court, "suddenly and with great force and violence converted Fischer Cut into the main channel of the river."

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[1] The case was brought and tried in the Circuit Court of Benton County, Ore. Both parties appealed from the judgment rendered by that court to the Oregon Court of Appeals. Subsequent to that judgment, our decision in *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973), had come down and the Court of Appeals employed the reasoning of *Bonelli* in deciding the appeal. Both parties then sought review in the Supreme Court of Oregon, which granted discretionary review limited to the factual question of the length of a channel known as Fischer Cut, modified the Court of Appeals' decision in this respect, and, without discussion, affirmed the decision "[i]n all other respects." Because of this procedural history we shall, as a matter of convenience, refer in the course of this opinion to rulings and findings of the "Oregon courts."

The trial court, sitting without a jury, awarded all parcels in dispute, except for the Fischer Cut lands, to the State. That court found that the State had acquired sovereign title to those lands upon admission into the Union, and that it had not conveyed that title. The State was also awarded damages to recompense it for Corvallis Sand's use of the lands.

With respect to the Fischer Cut lands, the trial court found that avulsion, rather than accretion, had caused the change in the channel of the river, and therefore the title to the lands remained in Corvallis Sand, the original owner of the land before it became riverbed.

The Oregon Court of Appeals affirmed. That court felt bound, under *Bonelli,* to apply federal common law to the resolution of this property dispute. In so doing, the court found that the trial court's award of Fischer Cut to Corvallis Sand was correct either under the theory of avulsion, or under the so-called exception to the accretion rule, announced in *Commissioners* v. *United States,* 270 F. 110 (CA8 1920).[2] The court, finding that preservation of the State's

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[2] The court quoted the following language from *Commissioners* in support of that rule:

"'[The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, interest in navigation, fishing, and other related goals did not require that it acquire ownership of the new bed, rejected the argument that the State's sovereign title to a riverbed follows the course of the river as it moves.

## II

In this Court, Oregon urges that we either modify *Bonelli* or expound "federal common law" in such a way that its title to all the land in question will be established. Corvallis Sand urges that we interpret "federal common law" in such a manner that it will prevail. *Amici,* as previously noted, urge that we re-examine *Bonelli* because in their view that case represented a sharp break with well-established previous decisions of the Court.[3]

The dispute in *Bonelli* was over the ownership of the former bed of the Colorado River, a bed which the river had abandoned because of a federal rechanneling project. The Bonelli land was not part of the actual riverbed, however, either at the time Arizona was admitted to the Union, or at the time of suit. Before Arizona had been admitted as a

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and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. . . .'" 18 Ore. App. 524, 539–540, 526 P. 2d 469, 477 (1974).

[3] The dissenting opinion is correct in stating that neither party in its brief requested that *Bonelli* be overruled. That question was elaborately briefed by *amici,* however, and counsel were questioned about it during oral argument. Counsel for *amici* urged that *Bonelli* be overruled. Counsel for the State agreed that a re-examination of *Bonelli* would be appropriate, and that upon such re-examination issues such as those in this case should be left to state law. Tr. of Oral Arg. 34.

State, Bonelli's predecessor in title had received a United States patent to the land. Over a period of years the Colorado River had migrated gradually eastward, eroding its east bank and depositing alluvion on its west bank in the process. In the course of this movement of the river the Bonelli land, which had at the time of patent been on the east bank, was submerged, and, until the rechanneling project, most of it was under water. After the completion of the rechanneling project the bed of the Colorado River was substantially narrowed, and the Bonelli land re-emerged.

The Supreme Court of Arizona held that Arizona owned the title to the beds of navigable rivers within its borders, and that Arizona therefore acquired title to the Bonelli land when it became part of the riverbed as a result of the eastward migration of the Colorado. That court went on to hold that under state law the re-emergence of the land was an avulsive change, which did not divest the State of its title to the exposed land. This Court granted certiorari and reversed the Supreme Court of Arizona.

We phrased the critical inquiry in *Bonelli* in these words:

> "The issue before us is not what rights the State has accorded private [land] owners in lands which the State holds as sovereign; but, rather, *how far* the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title to the lands *formerly* beneath the stream of the Colorado River *or whether that title is defeasible by the withdrawal of those waters.*" 414 U. S., at 319–320. (Emphasis added.)

We held that federal common law should govern in deciding whether a State retained title to lands which had reemerged from the bed of a navigable stream, relying in part on *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935). That case held that the extent and validity of a federal grant was a question to be resolved by federal law, and in *Bonelli* we decided that the nature of the title conferred by the equal-footing doctrine set forth in *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), should likewise be governed by federal common law. Under the equal-footing doctrine "the new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Mumford* v. *Wardwell*, 6 Wall. 423, 436 (1867). *Pollard's Lessee* held that under the equal-footing doctrine new States, upon their admission to the Union, acquire title to the lands underlying navigable waters within their boundaries.

We went on to discuss the nature of the sovereign's interest in the riverbed, which we found to lie in the protection of navigation, fisheries, and similar purposes. We held that under federal common law, as we construed it in that case, Arizona's sovereign interest in the re-emerged land was not sufficient to enable it to retain title. We found the principle governing title to lands which have been formed by accretion, rather than that which governs title where there has been an avulsive change in the channel of the river, to be applicable. We chose the former because it would both ensure the riparian owner access to the water's edge and prevent the State from receiving a windfall. We therefore decided that Bonelli, as riparian owner, was entitled to the land in question.

Our analysis today leads us to conclude that our decision to apply federal common law in *Bonelli* was incorrect. We first summarize the basis for this conclusion, and then elaborate in greater detail in Parts III and IV, *infra*.

The title to the land underlying the Colorado River at the time Arizona was admitted to the Union vested in the State as of that date under the rule of *Pollard's Lessee* v. *Hagan*, *supra*. Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law. *Wilcox* v. *Jackson,* 13 Pet. 498 (1839); *Weber* v. *Harbor Comm'rs,* 18 Wall. 57 (1873).

*Bonelli's* thesis that the equal-footing doctrine would require the effect of a movement of the river upon title to the riverbed to be resolved under federal common law was in error. Once the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have. Our error, as we now see it, was to view the equal-footing doctrine enunciated in *Pollard's Lessee* v. *Hagan* as a basis upon which federal common law could supersede state law in the determination of land titles. Precisely the contrary is true; in *Pollard's Lessee* itself the equal-footing doctrine resulted in the State's acquisition of title notwithstanding the efforts of the Federal Government to dispose of the lands in question in another way.

The equal-footing doctrine did not, therefore, provide a basis for federal law to supersede the State's application of its own law in deciding title to the Bonelli land, and state law should have been applied unless there were present some other principle of federal law requiring state law to be displaced. The only other basis[4] for a colorable claim of federal right in *Bonelli* was that the Bonelli land had originally been patented to its predecessor by the United States, just as had most other land in the Western States. But that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law. *Wilcox* v. *Jackson, supra,* at 517. Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided solely as a matter of Oregon law.

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[4] Arizona, in its brief, also relied upon the Submerged Lands Act of 1953, 43 U. S. C. § 1301. However, as discussed in *Bonelli,* the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, nor did it alter state property law regarding riparian ownership. The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government. As merely a declaration of the States' preexisting rights in the riverbeds, nothing in the Act in any way mandates, or even indicates, that federal common law should be used to resolve

## III

*Pollard's Lessee* v. *Hagan, supra,* holds that the State receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union, and contains not the slightest suggestion that such title is "defeasible" in the technical sense of that term. The issue there was whether a federal patent, issued after the admission of Alabama to the Union, could validly convey lands that had underlain navigable waters upon Alabama's admission. The Court had before it the following jury charge, given in the ejectment action below:

> "[T]hat if [the jury] believed the premises sued for were below usual high water-mark, at the time

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ownership of lands which, by the very terms of the Act, reside in the States. We recognized as much in *Bonelli,* see 414 U. S., at 318, and our references to the Act in *Bonelli* in no way indicate that it was the Act, rather than the scope of the equal-footing doctrine, which resulted in our application of federal common law:

"Since the Act does not extend to the States any interest beyond those afforded by the equal-footing doctrine, the State can no more base its claim to lands unnecessary to a navigational purpose on the Submerged Lands Act than on that doctrine." *Id.,* at 324–325.

> Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labour of man only, or by alluvion . . . ." 3 How., at 220.

The Court regarded the case as one of signal importance, and it observed that the decision was approached "with a just sense of its great importance to all the states of the union, and particularly to the new ones." *Ibid.* Mr. Justice Catron, in his dissenting opinion, commented that he deemed the case "the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds . . . ." *Id.,* at 235. The Court gave careful consideration to the role of the United States in holding the lands in question in trust for the new States, and to the recognition that the new States would be admitted "upon an equal footing, in all respects whatever . . ." with the original States. *Id.,* at 224. Citing *Martin* v. *Waddell,* 16 Pet. 367, 410 (1842), the Court noted that the original States held the " 'absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' " 3 How., at 229. The Court then concluded:

> "First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy . . . ." *Id.,* at 230.

In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union[5] nor a grant from Congress to a third party was capable of defeating.

Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned. For example, in *Weber* v. *Harbor Comm'rs*, 18 Wall., at 65–66, the Court reaffirmed the doctrine of *Pollard's Lessee:*

> "Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper,* subject only to the paramount right of navigation over the waters . . . ." (Emphasis added.)

In *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1877), the Court extended the doctrine to waters which were nontidal but nonetheless navigable, consistent with its earlier extension of admiralty jurisdiction to such waters in *The Propeller*

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[5] The compact entered into when Alabama was admitted to the Union contained the following language: " '[A]ll navigable waters within the said state shall for ever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state.'. . ." 3 How., at 229. The Court found that this language merely enunciated Congress' right to regulate commerce upon the navigable waters, similarly reserved to it with respect to the original States, and thus the language did not detract from the State's absolute title in the bed. *Id.*, at 229–230.

*Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1852). And in *Shively* v. *Bowlby,* 152 U. S. 1 (1894), the Court recounted *in extenso* the many cases which had followed the doctrine of *Pollard's Lessee.* In summarizing its holding, 152 U. S., at 57–58, the Court stated:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below [the] high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution."

At the time of our decision in *Bonelli,* this line of authority stood side by side with, and was wholly consistent with, other cases requiring the application of federal law to questions of land titles or boundaries. Where Mexico had patented tidal lands to a private owner before ceding to the United States the territory which ultimately became the State of California, California did not succeed to the ownership of such lands upon her admission to the Union. *Knight* v. *United States Land Assn.,* 142 U. S. 161 (1891). If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. See, *e. g., Nebraska* v. *Iowa,* 143 U. S. 359 (1892); *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918). Congress possesses by virtue of its commerce power a "navigational servitude" with respect to navigable waters.

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual

owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States,* 166 U. S. 269, 271–272 (1897).

In *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935), this Court also found a basis to apply federal law, but its rationale does not dictate a different result in this case. In *Borax,* the city of Los Angeles brought suit to quiet title in certain land in Los Angeles Harbor. Los Angeles claimed the land under a grant from the State of California, whereas Borax, Ltd., claimed the land as a successor in interest to a federal patentee. The federal patent had purported to convey a specified quantity of land, 18.88 acres, according to a survey by the General Land Office. This Court recognized that if the patent purported to convey lands which were part of the tidelands, the patent would be invalid to that extent since the Federal Government has no power to convey lands which are rightfully the State's under the equal-footing doctrine. *Id.,* at 17–19. The Court affirmed the decision of the Court of Appeals to remand for a new trial to allow the city to attempt to prove that some portion of the lands described in the federal patent was in fact tideland.

The Court went on to hold that the boundary between the upland and tideland was to be determined by federal law. *Id.,* at 22. This same principle would require that determination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State. The expressions in *Bonelli* suggesting a more expansive role for the equal-footing doctrine are contrary to the line of cases following *Pollard's Lessee.*[6]

For example, this Court has held that subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law. *Joy* v. *St. Louis,* 201 U. S. 332, 343 (1906). Indeed, the rule that lands once having passed from the Federal Government are subject to the laws of the State in which they lie antedates *Pollard's Lessee.* As long ago as 1839, the Court said:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever,* according to those laws, *the title shall have passed,* then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Wilcox* v. *Jackson,* 13 Pet., at 517. (Emphasis added.)

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[6] *Amici* Utah and New Mexico also urge us to reconsider our decision in *Hughes* v. *Washington,* 389 U. S. 290 (1967). They advance the same reasons for such reconsideration as they do with respect to *Bonelli.* But *Hughes* was not cited by the Oregon courts below, and in *Bonelli* we expressly declined to rely upon it as a basis for our decision there, see 414 U. S., at 321 n. 11. We therefore have no occasion to address the issue. We are aware of the fact that *Hughes* gave to *Borax* the same sort of expansive construction as did *Bonelli,* but we are likewise aware that *Hughes* dealt with oceanfront property, a fact which the Court thought sufficiently different from the usual situation so as to justify a "federal common law" rule of riparian proprietorship:

"The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land.'" 389 U. S., at 293.

The contrary approach would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be *constrained* by the equal-footing doctrine to apply the federal common-law rule, which may result in property law determinations antithetical to the desires of that State. See *Bonelli,* 414 U. S., at 332–333 (STEWART, J., dissenting).

Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.[7]

## IV

A similar result obtains in the case of riparian lands which did not pass under the equal-footing doctrine. This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 155 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift* v. *Tyson,* 16 Pet. 1 (1842), an exception was carved out for the local law of real property. *Id.,* at 18. See *United States* v. *Little Lake Misere Land Co.,* 412 U. S. 580, 591 (1973).

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[7] We are fortified in our conclusion that *Bonelli*'s equal-footing analysis was unsound by the fact that its author has likewise rejected it. The dissenting opinion of our Brother MARSHALL, *post,* p. 382, would sustain the result reached in *Bonelli* but on a ground explicitly avoided in the *Bonelli* opinion. The "mystery" or "puzzle" to which our Brother refers, *post,* at 384, turns out to be nonexistent; in rejecting *Bonelli*'s equal-footing analysis, we are simply refusing to be more Roman than the Romans. The dissent's own abandonment of *Bonelli*'s *ratio decidendi* is anything but a ringing endorsement of the rule of *stare decisis*.

This principle applies to the banks and shores of waterways, and we have consistently so held. *Barney* v. *Keokuk,* 94 U. S. 324 (1877), involved an ejectment action by the plaintiff against the city involving certain land along the banks of the Mississippi River. After noting that the early state doctrines regarding the ownership of the soil of nontidal waters were based upon the then-discarded English view that nontidal waters were presumed nonnavigable, the Court clearly articulated the rule that the States could formulate, and modify, rules of riparian ownership as they saw fit:

> "Whether, as rules of property, it would now be safe to change these doctrines [arising out of the confusion of the original classification of nontidal waters as nonnavigable] where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin* v. *Waddell,* 16 Pet. 367, *Pollard's Lessee* v. *Hagan,* 3 How. 212, and *Goodtitle* v. *Kibbe,* 9 *id.* 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters." *Id.,* at 338.

In *Shively* v. *Bowlby,* the Court canvassed its previous decisions and emphasized that state law controls riparian ownership. The Court concluded that grants by Congress of land bordering navigable waters "leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States." 152 U. S., at 58. As the Court again emphasized in *Packer* v. *Bird*, 137 U. S. 661, 669 (1891):

> "[W]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

This doctrine was squarely applied to the case of a riparian proprietor in *Joy* v. *St. Louis*, 201 U. S. 332 (1906). The land at issue had originally been granted to the patentee's predecessor by Spain, and Congress had confirmed the grant and issued letters patent. This Court held that the fact that a plaintiff claimed accretions to land patented to his predecessor by the Federal Government did not confer federal-question jurisdiction, and implicitly rejected any notion that "federal common law"[8] had any application to the resolution. Central to this result was the holding:

> "As this land in controversy is not the land described

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[8] We think that the insistence of our dissenting Brethren that "federal common law" should be applied to a determination of title in this case, albeit not for the same reason expounded in *Bonelli*, misapprehends the meaning and significance of the term "common law" as it is used in several of our old cases.

In the generic sense of the term, the "common law" has been defined as:

"'the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'" *Western Union Telegraph Co.* v. *Call Pub. Co.*, 181 U. S. 92, 102 (1901) (citing Black's Law Dictionary).

It is in this descriptive sense that the term is used in the two principal quotations relied upon in the dissenting opinion, *New Orleans* v. *United States*, 10 Pet. 662, 717 (1836), and *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68 (1874). In the passage from *New Orleans*, the Court

> in the letters patent or the [A]cts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States." *Id.*, at 343.

## V

Upon full reconsideration of our decision in *Bonelli*, we conclude that it was wrong in treating the equal-footing doctrine as a source of federal common law after that doctrine had vested title to the riverbed in the State of Arizona as of the time of its admission to the Union. We also think there was no other basis in that case, nor is there any in this case, to support the application of federal common law to override state real property law. There are obviously institutional considerations which we must face in deciding whether for that reason to overrule *Bonelli* or to adhere to it, and those considerations cut both ways. Substantive rules governing the law of real property are peculiarly subject to the principle of *stare decisis*. See *United States* v. *Title Ins. Co.*, 265 U. S. 472 (1924).

Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States. In cases such as this, considerations of *stare decisis* play a less important role than they do in cases involving substantive property law. Cf. *The Passenger Cases*, 7 How. 283,

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simply summarized the accepted British common-law doctrine of accretion. In *Lovingston*, the Court affirmed the judgment of the Supreme Court of Illinois which had rested upon the proper rule of common law, without any indication that this rule was not the law of Illinois. In light of the treatment of the subject in such later cases as *Barney* v. *Keokuk*, *Packer* v. *Bird*, *Shively* v. *Bowlby*, and *Joy* v. *St. Louis*, all discussed in the text, no "rule" requiring the application of "federal common law" to questions of riparian ownership may be deduced from *New Orleans* and *Lovingston*. See *post*, at 387–388.

470 (1849) (Taney, C. J., dissenting); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405–411 (1932) (Brandeis, J., dissenting); *Smith* v. *Allwright,* 321 U. S. 649 (1944). Even if we were to focus on the effect of our decision upon rules of substantive property law, our concern for unsettling titles would lead us to overrule *Bonelli,* rather than to retain it. See *Minnesota Co.* v. *National Co.,* 3 Wall. 332, 334 (1866). Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter. We are also persuaded that, in large part because of the positions taken in the briefs presented to the Court in *Bonelli,* the *Bonelli* decision was not a deliberate repudiation of all the cases which had gone before. We there proceeded on the view, which we now think to have been mistaken, that *Borax, supra,* should be read so expansively as to in effect overrule *sub silentio* the line of cases following *Pollard's Lessee.*

For all of these reasons, we have now decided that *Bonelli*'s application of federal common law to cases such as this must be overruled.

The judgment under review is vacated, and the case remanded to the Supreme Court of Oregon for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BRENNAN, dissenting.

I would not overrule *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973), and would therefore affirm the judgment of the Oregon Supreme Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE WHITE joins, dissenting.

The Court today overrules a three-year-old decision, *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973), in which seven of the eight participating Justices joined. In addition, as the Court is certain to announce when the occasion arises, today's holding also overrules *Hughes* v. *Washington,* 389 U. S. 290 (1967), a nine-year-old decision also joined by all but one of the participating Justices.[1] It is surprising, to say the least, to find these nearly unanimous recent decisions swept away in the name of *stare decisis.* See *ante,* at 381–382.

The public, especially holders of riparian or littoral property whose titles derive from the United States, deserve some explanation for the Court's change of course. Yet today's majority does not contend either that circumstances have changed since 1973 or that experience has shown *Hughes* and *Bonelli* to be unworkable. Nor does the majority attempt to explain why a result it finds so clearly commanded by our earlier cases was almost unanimously rejected by this Court twice in the last decade. We are left, then, with a mystery.

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[1] Although the Court rejects the reasoning on which *Hughes* is based, it refrains from formally overruling *Hughes* on the ground that that case was not relied on in *Bonelli* and not cited by the Oregon courts below. *Ante,* at 377 n. 6. In *Bonelli,* the Solicitor General urged the Court to find federal law controlling because riparian lands patented by the United States were involved and, under *Hughes,* federal common law therefore controlled the riparian rights of the landowner. Memorandum for United States as *Amicus Curiae* 3–4, filed Jan. 2, 1973; and Memorandum for United States as *Amicus Curiae* 2–3, filed Sept. 20, 1973, in *Bonelli Cattle Co.* v. *Arizona,* O. T. 1973, No. 72–397. The petitioner took the same position. Brief for Petitioners 31–34 in *Bonelli Cattle Co.* v. *Arizona, supra.* The *Bonelli* Court did not reach this contention, noting that there was some doubt that the land in question was riparian at the time of the federal patent. 414 U. S., at 321 n. 11. In its eagerness to do away with *Bonelli's* result as well as its approach, however, today's opinion explicitly concludes that had *Bonelli* relied on the theory advocated by the petitioner there and the Solicitor General, it would now be rejected. *Ante,* at 371–372, 378–381.

Nevertheless, the majority suggests that *Hughes* might still control oceanfront property. *Ante,* at 377 n. 6. It is difficult to take seriously the suggestion that the national interest in international relations justifies applying a different rule to oceanfront land grants than to other grants by the Federal Government. It is clear that the States have complete title to the lands below the line of mean high tide. See *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935); 43 U. S. C. §§ 1301 (a)(2), 1311. These lands, of course, are the only place where the waters " 'lap both the lands of the State and the boundaries of the international sea.' " *Ante,* at 377 n. 6, quoting *Hughes* v. *Washington,* 389 U. S., at 293. There are no international relations implications in the ownership of land above the line of mean high tide. See Note, The Federal Rule of Accretion and California Coastal Protection, 48 S. Cal. L. Rev. 1457, 1472 (1975).

I respectfully suggest that the solution to this puzzle is not hard to find. In contrast to the *Bonelli* and *Hughes* Courts, the Court today decides a question the parties did not present,[2] brief,[3] or argue.[4] By so doing, the Court rules

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[2] The cross-petitions for certiorari did not raise the question whether federal law governed the outcome; they were concerned only with whether the Oregon courts properly interpreted the governing federal common law.

The State's petition for certiorari in No. 76–567 stated the question presented as:

"In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding 'suddenly' becomes the main channel, and the other channel eventually becomes unusable, does federal law deprive the public of title to the beds of both channels?"

In No. 75–577, Corvallis Sand & Gravel Co. raised two questions in its petition for certiorari:

"1. Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover possession of the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no allegation pleaded and no proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by defendant Corvallis Sand and Gravel Company?

"2. Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover damages for the removal of sand and gravel from the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there

[*Footnotes 3 and 4 are on p. 385*]

without the benefit of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). The lack of illumination has caused the Court to choose the wrong path.

## I

The question the Court elects to decide in this case is whether a grant of riparian[5] land by the Federal Government is to be interpreted according to federal or state law. The Court holds that federal law governs only the determination of the initial boundaries of the grant; all other questions are to be determined under state law. This conclusion

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is no pleaded allegation or proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by the defendant Corvallis Sand and Gravel Company?"

[3] The parties' briefs faithfully mirrored their perceptions of the issues as presented in the petitions for certiorari. Thus, in No. 75-567, the State argued that the public interest requires recognition that the sovereign title in a riverbed is "full and complete" and that protecting that title requires that federal common law apply avulsion principles against a State only in very rare cases. Alternatively, the State argued that if classic avulsion principles applied, it still should receive title to the contested land. Corvallis Sand & Gravel responded by challenging the State's right to ownership of the riverbed under common law and by maintaining that the factfindings of the lower courts were both correct and not subject to review in this Court. In No. 76-577, the parties disputed Corvallis' contention that the State's title is limited to protection of navigation, fishery, and related uses and cannot be the basis for an ejectment action when those uses are not affected. Both parties assumed that federal common law governed the case.

[4] Counsel for the State of California, representing the *amici* States, argued that *Bonelli* should be overruled. Neither party addressed that issue except in response to questions from the Court. In response to those questions, counsel for both parties stated that federal common law should govern this case. Tr. of Oral Arg. 14, 28, 33.

[5] For convenience, I will use "riparian" in place of "riparian or littoral" for the remainder of this opinion.

depends on an unjustifiably limited interpretation of the meaning of a riparian grant.

It is undisputed that "the quality of being riparian" is perhaps "the land's 'most valuable feature' and is part and parcel of the ownership of the land itself." *Bonelli Cattle Co.* v. *Arizona,* 414 U. S., at 326, quoting *Hughes* v. *Washington,* 389 U. S., at 293. Cf. *New Orleans* v. *United States,* 10 Pet. 662, 717 (1836). In the natural course, however, a riparian boundary tends to move, a fact reflected in the common-law doctrines of accretion, avulsion, erosion, and reliction. Prior to today's ruling, federal grantees of riparian land, and holders under them, correctly understood that their titles incorporated boundaries whose precise location would depend on the movements of the water and on the federal common law.

There can be no doubt that the federal grantee's expectation that his grant would be interpreted according to federal law and his belief that federal law would recognize boundary shifts occasioned by changes in the course of the water bordering his land were well founded. One hundred forty years ago, this Court found it obvious that whoever had title to the land bordering water would have title to new land formed by alluvial deposits on the existing upland:

> "The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, *shall still hold by the same boundary,* including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory: and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain." *Ibid.* (emphasis added).

This statement of the law was quoted by the Court in *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68 (1874).

The Court in *County of St. Clair* went on to note: "The riparian right to future alluvion is a vested right. *It is an inherent and essential attribute of the original property.*" *Ibid.* (emphasis added). Similarly, in *Shively* v. *Bowlby*, 152 U. S. 1 (1894),[6] the Court said:

> "The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; *and is independent of the law governing the title in the soil covered by the water.*" *Id.*, at 35 (emphasis added).

Thus, the right to such additions[7] was part of the title which passed with the federal grant, cf. 3 American Law of Property § 15.27, p. 859 (A. J. Casner ed. 1952), and was protected by federal law. By holding that state law now governs the impact of changes in the course of the bordering water on a federal riparian grant, the Court denies that "a question which concerns the validity and effect of an act done by the United States" is "necessarily a federal question." *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22 (1935). As far as federal law is concerned, a federal riparian grant is now understood to have incorporated a fixed rather than ambulatory boundary. *Ante,* at 376. The rule of *New Orleans* v. *United States, supra,* and *County of St. Clair* v. *Lovingston, supra,* is discarded along with *Bonelli* and *Hughes.*

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[6] Cited *ante*, at 375, 379–380.

[7] In *Bonelli*, the question was ownership of relicted land, which is land exposed by the subsidence of the water. The law of reliction is identical to the law of accretion. 3 American Law of Property § 15.26 (A. J. Casner ed. 1952). In the present case, the State claims title to land by virtue of the doctrine of erosion, the converse of accretion. Corvallis Sand & Gravel resists by arguing that the change in the river's course was not gradual, as erosion and accretion require, but sudden. A sudden, or avulsive, change does not effect a shift in boundaries. These doctrines form a coherent system. It would make no sense to hold that the federal doctrine of accretion must be applied to the benefit of a federal riparian grantee but that the federal doctrine of avulsion need not be applied.

The cases the Court concludes compel this dramatic shift do not even support it. *Wilcox* v. *Jackson,* 13 Pet. 498 (1839),[8] was an action of ejectment brought against the commander of a United States military post to recover part of the post. The plaintiff claimed under a state registration certificate. As the majority notes, the Court rejected that argument with the following language:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; *so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.*" *Id.,* at 517 (emphasis added).

The italicized language, on which the majority opinion makes no comment, explains why state law cannot control this case. Denial of the riparian holder's federal common-law rights to a changing boundary is not "consistent with the admission that the title . . . vested according to the laws of the United States."

In *Packer* v. *Bird,* 137 U. S. 661 (1891),[9] the Court held that it would construe federal grants of lands bordering navigable but nontidal waters as reaching only to the edge of the stream. As it did in *Wilcox,* the Court in *Packer* noted that state law governs property once it has passed from the hands of the Federal Government. But the *Packer* Court, like its predecessor, also noted that the influence of state law is "subject to the condition that [state] rules do not impair the efficacy of the [federal] grants or the use and enjoyment of the property by the grantee." 137 U. S., at 669. Today's holding, which allows States to divest federally granted lands of their valuable quality of being riparian simply by refusing to recognize the titleholders' common-law rights, obviously removes this fundamental limitation on state power.

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[8] Cited *ante,* at 371, 372, 377.

[9] Cited *ante,* at 380.

The Court also attempts to draw support from cases which affirm the proposition that the riparian title passed by a federal grant conveys title only to the water's edge, not to the middle of the stream. *Barney* v. *Keokuk,* 94 U. S. 324 (1877),[10] was a controversy over the ownership of land created when the city of Keokuk filled in land below the ordinary high-water mark. The plaintiff claimed title to the new land by virtue of his asserted ownership of the adjacent upland. The Court noted that "[i]t is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes." *Id.,* at 337. Whether the same rule applied to land created out of the bed of the river, however, the Court considered a question of state law. The reason for this, as the Court explained, is that the riparian rights granted by the Federal Government extended only to the water's edge; if the States wish to grant the riparian owner rights beyond that point, they may do so at their own discretion. See *id.,* at 338. The Court transforms this conclusion that the States may, if they wish, enlarge the title granted by the Federal Government into support for the proposition that the States may also restrict that title. The transformation is impressive, but it is not logical.

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[10] Cited *ante,* at 374, 379.

The issue before the Court in *Shively* v. *Bowlby, supra*, was the title to land below the high-water mark of the Columbia River in Oregon. Shively claimed under a prestatehood grant from the United States, while Bowlby based his title on a subsequent grant from the State of Oregon. The Court held for Bowlby, finding that although Congress could have granted Shively title to the land he claimed,[11] it had not done so, nor had the State. 152 U. S., at 48–57.

As the majority indicates, the *Shively* Court engaged in a thorough review of earlier cases. It summarized its conclusions, in part, as follows:

> "The title and rights of riparian or littoral proprietors in the soil below [the] high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." *Id.*, at 57–58.

But the *Shively* Court, unlike today's majority, realized that this proposition does not affect the rights of riparian holders to the benefits of the common-law doctrines governing boundary changes.[12] Those rights are "independent of the law governing the title in the soil covered by the water." *Id.*, at 35. See *id.*, at 36.[13]

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[11] The language in *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), on which the majority heavily relies to prove that Congress had no such power, see *ante*, at 372–374, was dismissed as dictum by the *Shively* Court. See 152 U. S., at 28.

[12] The majority also quotes the *Shively* Court's statement that federal grants " 'leave the question of the use of the shores by the owners of uplands to the sovereign control of each State.' " *Ante*, at 379, quoting 152 U. S., at 58. It is clear from the context that by "shores" the *Shively* Court meant the land below the high-water mark. The State, as owner of that land, controls it. The Court did not suggest that the State was free to diminish the title of the upland owner by denying his right to an ambulatory boundary if the "shores" recede or the uplands grow.

Thus, the cases refute the majority's contention that the results in *Hughes* and *Bonelli* sharply departed from prior law. Today's holding cannot, therefore, be based on interpretation of the meaning of the pre-statehood riparian grants under which Corvallis Sand & Gravel holds title, since the right to an ambulatory boundary was assumed to be part of the rights of a riparian grantee at the time the grants were made. Moreover, the cases also demonstrate that there is no constitutional basis for today's holding. The only constitutional question discussed in the majority opinion is the law governing the States' title to land beneath navigable waters, and the rights of the riparian holder are independent of that law.

## II

Since today's ruling cannot be a matter either of constitutional law or of interpretation of the meaning of federal grants, it must be a choice-of-law decision. In deciding whether to formulate and apply a federal common-law rule, "normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown." *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 68 (1966). See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 756–832 (2d ed. 1973). In order to assure an informed presentation of federal policies and interests when faced with a choice between federal and state law, this Court in the past has invited the Solicitor General to file a brief *amicus curiae* expressing the views of the United States.[14] See, *e. g.*, *Wallis* v. *Pan American Petroleum Corp.*, 382 U. S. 810 (1965); *Yiatchos* v. *Yiatchos*, 372 U. S. 905 (1963). We followed this practice in both *Bonelli*, 409 U. S. 1022 (1972), and *Hughes*, 385 U. S. 807 (1966), and the Solicitor General participated as an *amicus* in both cases.

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[13] The majority's assertion that the rule of *New Orleans* v. *United States*, 10 Pet. 662 (1836), and *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874), is merely a description of the English common law, *ante*, at 380–381, n. 8, is belied by the *Shively* Court's affirmation of the independence of the riparian holder's rights from the law governing the lands beneath the water. The majority chooses not to discuss this aspect of *Shively*.

*Joy* v. *St. Louis*, 201 U. S. 332, 342, 343 (1906), cited *ante*, at 377, 380, does contain language which supports the conclusions reached by the majority. That case, however, did not involve lands in which a grantee of the United States held or claimed title. The land in that case was granted by Spain. Congress confirmed the grant, but by so doing it added nothing to the title conferred by Spain. See *Joy* v. *St. Louis*, 122 F. 524 (ED Mo. 1903), aff'd, 201 U. S. 332 (1906); *United States* v. *Washington*, 294 F. 2d 830, 833 (CA9 1961), cert. denied, 369 U. S. 817 (1962).

Today's majority has made no similar effort to inform itself about the impact of its ruling on the Federal Government. Indeed, the majority opinion does not even consider that issue, although it is normally central to a choice-of-law decision. As the opinion and result show, the only views the Court has received are those of the *amici* States, whose interests here are hostile to those of the United States.

I cannot, of course, know what the Solicitor General would have said had the Court indicated that it was considering a choice-of-law question and invited him to present the views of the Government. In both *Bonelli* and *Hughes*, however, the submissions for the United States as *amicus curiae* strongly urged the Court to hold that federal rather than state law governed the case. In *Bonelli,* the Government noted that its quiet enjoyment of the more than 200 miles of Colorado River shoreline it owned in Arizona had been threatened by some interpretations of the state court's decision. Memorandum for the United States as *Amicus Curiae* 1–2, filed Sept. 20, 1973, in *Bonelli Cattle Co.* v. *Arizona,* O. T. 1973, No. 72–397. The Government urged that the state-court opinion be given a narrow interpretation and affirmed as consistent with the applicable federal law. *Id.,* at 3–5.

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[14] When the papers before the Court indicate that a choice-of-law question will be presented, the Solicitor General sometimes prepares an *amicus* brief on his own motion. See, *e. g.*, Memorandum for United States as *Amicus Curiae* and Brief for United States as *Amicus Curiae* in *Free* v. *Bland*, O. T. 1961, No. 205. In the present case, of course, the Solicitor General had no notice from the petitions for certiorari that the issue decided today would be raised. See n. 2, *supra*.

In *Hughes,* the Government urged that the decision of the State Supreme Court be reversed. The Solicitor General explained that the Government considered that decision a serious threat:

> "The decision is of broad consequence. It trenches on a significant element of title to realty acquired from the United States in the past and it materially curtails the nature of the title that the United States may convey in the future. . . . Equally important, it affects the powers of the United States with respect to more than 200 miles of Washington's coastline owned today by the federal government. Moreover, the principle of a fixed tideland boundary may readily be brought to bear on the property of the United States and its patentees in other coastal States. . . . Nor is there any apparent reason why, in Washington or elsewhere, the principle should be limited to tidelands; it can be applied with consistency of logic to the shifting banks of rivers and lakes owned by a State. . . . An inducement for the adoption and expansion of this principle is not lacking, since it tends inevitably to bring land into State ownership, and the sale of land thus acquired has been recognized as an attractive source of State revenue . . . .
>
> "To be sure, the court below stated that it did not 'question the federal government's right over its own

> property' . . . . [But] the court below failed to recognize that 'the federal government's right over its own property' embraces the right effectively to dispose of such property." Memorandum for United States as *Amicus Curiae* 3–5 in *Hughes* v. *Washington*, O. T. 1967, No. 15.

The Solicitor General explained that the decision in *Hughes* endangered the Government's ability to carry out congressional policy toward Indians, since the Government would no longer have been able to convey rights to a boundary adjacent to the sea if it turned over trust lands to the Indian beneficiaries. *Id.*, at 5–6; cf. *United States* v. *Washington*, 294 F. 2d 830 (CA9 1961), cert. denied, 369 U. S. 817 (1962). But the problem with the Indian trust lands was merely "exemplary" because the state decision in *Hughes*

> "restrains the government from disposing of the full measure of its title in connection with any program or policy which it may wish to pursue in the future. In sum, we do not believe that it can be said here, as it could in *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 68, that there is 'no significant threat to any identifiable federal policy or interest.'" Memorandum for United States as *Amicus Curiae* 6 in *Hughes* v. *Washington*, *supra*.

Today's decision necessarily has an even greater impact on federal interests, since it casts doubt on the Government's continued ownership "of the full measure of its title."

## III

One final word. *Stare decisis* should be more than a fine-sounding phrase. This is especially true for us, because "unless we respect the . . . decisions of this Court, we can hardly expect that others will do so." *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 629, 634 (1974) (STEWART, J., dissenting). Accordingly, "[a] substantial departure from precedent can only be justified . . . in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment." *Id.,* at 634–635. Such admonitions are even more salient where land titles are concerned. Yet the majority has advanced neither experience nor changed circumstances to justify its interment of a 7–1 decision of this Court issued barely three years ago.

I am convinced that if the Court had considered the cases on which it relies in the light of an adversary presentation and had invited the Government to explain its interest in the application of federal law, the result today would be different. I therefore respectfully dissent.

# PEARSON *v.* DODD ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 75-1318. Argued December 1, 1976—Decided January 12, 1977

Where under West Virginia law absolute title to appellant's oil and gas interest in land had vested in the State at the expiration of the 18-month period after sale of the interest to the State for nonpayment of taxes, during which period appellant might have exercised but did not exercise her right to redeem, appellant has no constitutionally protected property or entitlement interest upon which she may base a challenge of constitutional deficiency in the notice provisions attending the State's subsequent sale of the interest to appellee Dodd, and hence the appeal is dismissed for want of a properly presented federal question.

Appeal dismissed. Reported below: — W. Va. —, 221 S. E. 2d 171.

*Philip G. Terrie* argued the cause and filed briefs for appellant.

*Wm. Roy Rice* argued the cause for appellees. With him on the brief were *John D. Daly* and *Thomas E. Morgan.**

PER CURIAM.

When appellant failed to pay 1961 real estate taxes pertaining to her one-quarter interest in the oil and gas in 68 acres of land in Kanawha County, W. Va., the interest became subject to transfer to the State under West Virginia statutory procedures that afford notice to the landowner only through the posting of a delinquency list on the county courthouse door and the publication of the list in local newspapers. W. Va. Code §§ 11A-2-10a, 11A-3-2 (1974). The interest was sold to the State under these procedures in 1962.

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**Chauncey H. Browning, Jr.*, Attorney General, *Jack C. McClung*, Deputy Attorney General, and *C. Page Hamrick III*, Assistant Attorney General, filed a brief for the State of West Virginia as *amicus curiae* urging affirmance.

West Virginia Code § 11A-3-8 (1974) gave appellant a statutory entitlement to redeem the interest at any time within 18 months of the date of the state purchase, but appellant did not redeem during that period. The State thereafter decided to sell the interest and, as required by West Virginia law, commenced a suit in State Circuit Court to effect a sale. The suit resulted in the conveyance in 1966, by tax deed, of the oil and gas interest to appellee W. P. Dodd. The only notice of this sale was by way of publication in two local newspapers, pursuant to § 11A-4-12 (1974). Over two years later, in July 1968, appellant attempted to pay the State Auditor a sum of money to redeem the interest. Appellant then brought this action in state court to quiet title. The Circuit Court rendered judgment for appellees. The West Virginia Supreme Court of Appeals affirmed, — W. Va. —, 221 S. E. 2d 171 (1975). We noted probable jurisdiction. 426 U. S. 946 (1976).

The Jurisdictional Statement phrased the due process question presented by the appeal as whether notice by publication of the tax sale was constitutionally deficient, but was unclear whether the challenge was directed to the 1962 sale to the State or to the 1966 sale to appellee Dodd. At oral argument counsel for appellant made clear, however, that her challenge was not addressed to the procedures for notice attending the 1962 transfer of the interest to the State, Tr. of Oral Arg. 21-23, but solely to the procedures for notice attending the 1966 sale of the interest by the State to appellee Dodd. Indeed, we were repeatedly informed that the 1962 sale to the State was not even "an issue in this case." *Id.*, at 22, 25, 26. But under state law absolute title had vested in the State at the expiration of the 18-month period after the 1962 sale during which appellant might have exercised but did not exercise her right to redeem: § 11A-4-12 expressly provides that in such circumstance "the State has absolute title to all . . . land sold to the State for nonpayment of taxes . . . [which has] become irredeemable . . . ." Appellant thus has no constitutionally protected property or entitlement interest upon which she may base a challenge of constitutional deficiency in the notice provisions attending the 1966 sale to appellee Dodd. The appeal is therefore dismissed for want of a properly presented federal question.

*So ordered.*

# GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL. *v.* JACKSON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 76-61. Decided January 17, 1977

The District Court's injunction against enforcement of the Louisiana abortion statute is vacated insofar as it bars enforcement of the "informed consent" requirements, and the case is remanded to that court to consider the construction of such requirements, their validity in light of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 65-67, and their severability from the remainder of the statute.

Vacated and remanded.

PER CURIAM.

A Louisiana statute* forbids performance of an abortion on a minor without her parents' consent, or her husband's consent if she is married. The United States District Court for the Eastern District of Louisiana enjoined enforcement of the statute. Its decision discusses only these special requirements for abortions on minors, but the injunction appears

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*Louisiana Rev. Stat. Ann. § 40:1299.33 (D) (Supp. 1976) reads as follows:

"No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance or any other kind of benefits for refusing to submit to an abortion. This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised. Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and by written consent of her parents, if she to extend to the entire statute, and thus includes "informed consent" requirements applicable to all women. We vacate the injunction insofar as it bars enforcement of the "informed consent" requirements, and remand to the District Court so that it may consider the construction of those requirements, their validity in light of this Court's intervening decision in *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, 65–67 (1976), and their severability from the remainder of the statute.

*So ordered.*

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is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage, such written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood."

# WALSH, DBA TOM WALSH & CO. v. SCHLECHT ET AL., TRUSTEES

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 75-906. Argued November 1, 1976—Decided January 18, 1977

Section 302 (a)(1) of the Labor Management Relations Act prohibits agreements of employers to pay money to any representative of their employees, but §§ 302 (c)(5) and (6) exempt from this proscription agreements to pay money to trust funds jointly created and administered by trustees representing employer associations and a labor union for the purpose of providing medical or hospital care, pensions, or pooled vacations for employees of signatory employers, or to defray the costs of apprenticeship or other training programs. A collective-bargaining agreement between petitioner general contractor and a carpenters' union required signatory employers to pay contributions at an aggregate rate of 96 cents per hour worked by carpenter employees to certain trust funds (Health and Welfare, Pension, Vacation Savings, Apprenticeship and Training, and Construction Industry Advancement (CIAF)) administered by respondent trustees. With respect to nonsignatory subcontractors, a subcontractor's clause of the agreement specified that petitioner should require the subcontractor to be bound by the agreement or that petitioner should maintain daily records of the subcontractor's employees' hours and to be liable for payment of the contributions to the trust funds with respect to these employees. Petitioner subcontracted certain carpentry work on a federally subsidized low-income apartment project in Oregon to a nonsignatory employer (whose employees were not entitled to benefits in the trust funds), but did not exercise either of the above options. Instead, the subcontractor paid directly to his employees, as fringe benefits, 96 cents per hour in addition to their wages at union scale, thus paying out the same aggregate of wages and fringe benefits paid by signatory employers in the form of wages to their employees and contributions to the trust funds. Upon completion of the project, respondents sued petitioner in Oregon state court to enforce the subcontractor's clause, and petitioner defended on the ground that the clause violated § 302 (a)(1). The trial court sustained respondents' demurrer, and, while holding that it would be "inequitable" to require contributions to the Health and Welfare, Pension, and Vacation Savings Funds because they would amount to a double payment with respect to the subcontractor's employees, ordered an accounting limited to contributions to the Apprenticeship and CIAF trusts that did "not accrue benefits directly to the workmen." The Oregon Supreme Court affirmed sustainment of the demurrer, but, construing the subcontractor's clause as giving all the funds equal standing, reversed the judgment insofar as it limited the accounting to the Apprenticeship and CIAF trusts. *Held:*

1. Federal- rather than state-law principles of contract construction apply in determining the meaning of the subcontractor's clause, since it is a provision of a collective-bargaining agreement and application of federal law is necessary to avoid the "possibility that individual contract terms might have different meanings under state and federal law," *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103. Pp. 407–408.

2. The subcontractor's clause, as construed by the Oregon Supreme Court to require petitioner to make contributions to the trust funds measured by the hours worked by his subcontractor's employees, the benefits being payable only to carpenters employed by petitioner or other signatory employers, does not violate § 302 (a)(1) but is authorized by §§ 302 (c)(5) and (6). Enforcement of the clause as so construed not only is consistent with the wording of §§ 302 (c)(5) and (6) but also does no disservice to the congressional purpose in enacting § 302 to combat "corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U. S. 419, 425–426. Pp. 408–411.

3. The objective of the Davis-Bacon Act to protect contractors' employees from substandard earnings by fixing a floor under wages on Government projects, is not "frustrated" by the subcontractor's clause, since such objective is clearly not "frustrated" when contractual arrangements between employers and their employees result in higher compensation and benefits than the floor established by that Act. P. 411.

273 Ore. 221, 540 P. 2d 1011, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, *post*, p. 411.

*Carl R. Neil* argued the cause and filed briefs for petitioner.

*Paul T. Bailey* argued the cause for respondents. With him on the brief was *George Kaufmann.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the provision of a collective-bargaining agreement between petitioner, a general contractor, and the Oregon State Council of Carpenters, requiring that petitioner pay contributions to certain trust funds with respect to hours of carpentry work performed by employees of a nonsignatory subcontractor, violated § 302 (a)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U. S. C. § 186 (a)(1). That section generally prohibits agreements of employers to pay money to any representative of their employees. Sections 302 (c)(5) and (6), however, exempt from this general proscription written agreements to pay money to trust funds jointly created and administered by trustees representing employer associations and the union for the purpose of providing medical or hospital care, pensions, pooled vacations for employees of signatory employers, or to defray the costs of apprenticeship or other training programs.[1]

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*Briefs of *amici curiae* were filed by *Steven R. Semler* for Huico, Inc.; and by *Richard M. Stanislaw* for the Mechanical Contractor Associations of Washington.

[1] Section 302 of the Labor Management Relations Act, 1947, 61 Stat. 157, as amended, 29 U. S. C. § 186, provides in pertinent part:

"(a) It shall be unlawful for any employer or association of employers . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce;

. . . . .

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families, and dependents (or of such employees, families, and dependents jointly with the employees of

Petitioner constructed a federally subsidized low-income apartment project in Salem, Ore. A collective-bargaining agreement between petitioner and the Oregon State Council of Carpenters required petitioner to pay contributions to five employer-union trust funds jointly created by the carpenters' union and multiemployer general contractors associations, and jointly administered by respondents, trustees designated in equal numbers by the employers and union. The trusts are, respectively, the Health and Welfare Trust Fund, the Pension Trust Fund, the Vacation Savings Trust Fund, the Apprenticeship and Training Trust Fund, and the Construction Industry Advancement Fund (CIAF). Only signatory employers may contribute to the funds; and no carpenter employee of a nonsignatory employer is entitled to benefits in the Health and Welfare, Pension, and Vacation Savings Funds, the three funds that provide benefits for carpenter employees.[2] Contributions were payable at the

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other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . ; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds . . . ."

[2] Petitioner conceded that the trustees will not accept contributions from nonsignatory employers. App. 53. The five trust funds involved in this case expressly limit participation in benefits to employees of signatory employers and petitioner makes no claim that the subcontractors' employees received benefits from the funds.

aggregate rate of 96 cents per hour of carpentry work done at the project.

Petitioner subcontracted the framing work on the project to Lloyd Jackson, a framing specialist, who was a nonsignatory employer and whose employees were therefore not eligible for trust fund benefits. In such cases petitioner had the option under a "subcontractor's clause," Art. IV of the collective-bargaining agreement, of requiring "such subcontractor to be bound to all the provisions of this Agreement," or of maintaining "daily records of the subcontractors employees jobsite hours and be liable for payment of these employees [*sic*] . . . [trust fund] contributions in accordance with this Agreement."[3] Petitioner did neither. He did not require that the subcontractor "be bound" to the agreement and the subcontractor made no contributions to the funds. Instead the subcontractor paid directly to his carpenter employees, as fringe benefits, 96 cents per hour in addition to their wages at union scale,[4] thus paying out the same aggregate of wages and fringe benefits paid by signatory employers in the form of wages to their employees and contributions to the trust funds.

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[3] Article IV of the Carpenters Master Labor Agreement between general contractors associations and the Oregon State and Southwest Washington District Councils of the United Brotherhood of Carpenters and Joiners of America, with which petitioner by memorandum agreement agreed to comply, provides as follows:

"If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the employer shall require such subcontractor to be bound *to all the provisions of this Agreement, or* such employer shall *maintain daily records of the subcontractors employees job site hours and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement.*" (Emphasis added.)

[4] Agreements with the Department of Housing and Urban Development required employers participating in the Salem project to pay their employees according to the prevailing wage scale, as defined in the Davis-Bacon Act, 40 U. S. C. § 276a. Under the Act, fringe benefits may be

Nor did petitioner maintain daily records of and pay contributions to the trust funds with respect to the hours of carpentry work performed on the project by the subcontractor's carpenter employees. Therefore, after completion of the project, respondent trustees brought this action in the Circuit Court of Multnomah County, Ore., to enforce the provision of Art. IV. Grounded upon petitioner's agreement to "be liable for payment of these [the subcontractor's] employees [*sic*] . . . [trust fund] contributions . . . ," the complaint sought, *inter alia*, an accounting of the hours of carpentry work performed by the subcontractor's employees on the project, and a judgment for the amount of such work at 96 cents per hour. Petitioner's principal defense was that the subcontractor's clause violated § 302 (a)(1). The Circuit Court sustained respondents' demurrer to that defense. The Circuit Court held, however, that it would be "inequitable" to require contributions to the Health and Welfare, Pension, and Vacation Savings Funds because they would in effect amount "to double fringe benefits" with respect to the subcontractor's employees. It therefore ordered an accounting limited to contributions to the Apprenticeship and CIAF trusts that did "not accrue benefits directly to the workmen." The Supreme Court of Oregon affirmed the judgment insofar as it sustained the demurrer to petitioner's defense based on § 302 (a)(1) but, construing the subcontractor's clause as giving all the "funds . . . equal standing under the terms of the contract . . . ," reversed the judgment insofar as it limited the accounting to the Apprenticeship and CIAF trusts.

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paid either to the workmen directly or to union-employer trusts for the benefit of the workmen. The Act applies to all construction contracts to which the United States is a party.

273 Ore. 221, 225–226, 540 P. 2d 1011, 1013–1014 (1975). We granted certiorari, 424 U. S. 942 (1976). We affirm.

## I

The parties agree that the determinative question for decision is that of the proper construction of the subcontractor's clause: whether that clause binds petitioner to make contributions to the trust funds "on behalf of" or "for the benefit of" the subcontractor's employees, so that they may participate in the benefits provided carpenters by the funds. Thus interpreted, the clause would violate § 302 (a)(1) because the subcontractor is not a signatory to the collective-bargaining agreement and his employees are therefore ineligible for trust fund benefits based on carpentry work performed for him. On the other hand, if the clause merely obligates petitioner to pay contributions to the funds *measured by* the hours of carpentry work performed at the project by the subcontractor's employees, the benefits being payable only to carpenters employed by petitioner and other signatory employers, then the clause is authorized by the exceptions to the general prohibition of § 302 (a) enacted in §§ 302 (c)(5) and (6).

Before turning to the question of the meaning of the clause we must address a threshold question—whether federal or state law principles of contract construction, if they differ, are to be applied. Plainly federal law principles apply. Although the Oregon courts were not foreclosed from entertaining this suit merely because petitioner's defense invoked § 302 (a)(1) of the Taft-Hartley Act, *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), we have proceeded "upon the hypothesis that state courts would apply federal law in exercising [such] jurisdiction" and that "incompatible doctrines of local law must give way to principles of federal labor law." *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 102 (1962) (citations omitted). Application of federal law is necessary to avoid the "possibility that individual contract terms might have different meanings under state and federal law . . . ," *id.*, at 103.

The Oregon courts did not specify in this case whether federal or state principles of contract construction guided their concurring conclusions that the subcontractor's clause was not to be read as violating § 302 (a)(1). We shall therefore assume that federal principles were applied. In any event, if in fact state rules of contract interpretation were employed, federal rules would require agreement with the Oregon courts' construction. Since a general rule of construction presumes the legality and enforceability of contracts, 6A A. Corbin, Contracts §§ 1499, 1533 (1962), ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable. The subcontractor's clause although inartfully worded, lends itself to a construction that ties signatory employer contributions to the trust funds as measured both by hours worked by his own employees and hours worked by his nonsignatory subcontractor's employees, and, so construed, Art. IV does not violate § 302 (a)(1).

Petitioner argues that the Oregon Supreme Court's opinion reads the clause as requiring petitioner to make payments "on behalf of" Jackson's employees in order that they may participate in the benefits of the trusts. This reading, he contends, is implicit in the following passage from the State Supreme Court's opinion:

> "In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds *for his own employees and* also specifically provided that in the event he engaged a subcontractor to do any work covered by the agree-

> ment he would be liable for payments into the various trust funds *for the employees of such a subcontractor.*" 273 Ore., at 229, 540 P. 2d, at 1015 (emphasis added).

Read in isolation, this somewhat ambiguous passage might appear to support petitioner's argument. In the context of the entire opinion, however, particularly its reliance upon lower federal court decisions upholding the legality of payments measured in whole or in part by wages paid to employees ineligible to receive benefits, it becomes clear that the Oregon Supreme Court read the subcontractor's clause as an agreement by petitioner to make contributions to the funds measured by the hours of carpentry work performed by the subcontractor's employees, not "on behalf of" or "for the benefit of" the nonsignatory contractor's ineligible employees, but solely for the benefit of the employees of petitioner and other signatory employers. This conclusion follows, we think, from the Oregon Supreme Court's treatment of *Moglia* v. *Geoghegan*, 403 F. 2d 110 (CA2 1968), and *Kreindler* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 (SDNY 1960). In rejecting petitioner's argument that § 302 (a)(1) prohibits an employer from making any contributions except for the benefit of his own and other signatory employers' employees, the court characterized language in *Moglia*, cited by petitioner in support of this construction, as "not necessary to . . . decision in that case, in which there was no written agreement, and it is not binding upon this court in this case." 273 Ore., at 229 n. 4, 540 P. 2d, at 1015 n. 4.[5] Rather, the Oregon Supreme Court relied on *Kreindler*, also involving payments to a trust fund for employees of a nonunion contractor, where the contention was rejected that an employer's contributions measured by the hours worked of another employer's employees violated § 302 (a)(1). The court quoted extensively from the *Kreindler* opinion's reasoning in concluding that payments might be legal even though measured by hours worked by employees of another employer. The court stated flatly: "We agree with [the] statement" from *Kreindler* that "'[t]he fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal.'" 273 Ore., at 230, 540 P. 2d, at 1015.[6] Accord, *Budget Dress Corp.* v. *Joint Board of Waistmakers' Union,* 198 F. Supp. 4 (SDNY 1961), aff'd, 299 F. 2d 936 (CA2 1962); *Minkoff* v. *Scranton Frocks, Inc.,* 181 F. Supp. 542 (SDNY), aff'd, 279 F. 2d 115 (CA2 1960); *Greenstein* v. *National Skirt & Sportswear Assn.,* 178 F. Supp. 681 (SDNY 1959).

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[5] Moglia had been employed for 28 years by a single employer whose payments into the trust fund had been illegal because he was not a party to a written agreement as required by § 302 (c)(5)(B). 403 F. 2d, at 114. The Court of Appeals for the Second Circuit concluded that Moglia was not eligible to receive benefits because he had never been an employee of an employer lawfully contributing to the fund.

We agree that enforcement of the subcontractor's clause, as so construed by the Oregon Supreme Court to require petitioner to make contributions measured by the hours worked by his subcontractor's employees, not only is consistent with the wording of §§ 302 (c)(5) and (6) but also does no disservice to the congressional purpose in enacting § 302[7] to combat "corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States,* 359 U. S. 419, 425–426 (1959).

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[6] A provision of the controlling collective-bargaining agreement required Clarise, as a member of a multiple-employer bargaining association, to make payments to the union's health and welfare and retirement funds based both upon Clarise's own payrolls and upon the payrolls of the contractors who manufactured Clarise's product. The employees of Clarise's contractors were not eligible to receive benefits from the funds.

[7] The agreement establishing the CIAF trust provides for exclusive employer administration and that fund is therefore outside the coverage of § 302.

Our decision that the subcontractor's clause does not violate § 302 makes it unnecessary to address petitioner's argument that § 302 (c)(6) should be read to incorporate the "exclusive benefit" requirement of § 302 (c)(5).

## II

Petitioner also advances an argument, apparently not made in the Oregon courts, that the subcontractor's clause "frustrates" the objectives of the Davis-Bacon Act, 40 U. S. C. § 276a, by increasing his labor costs over the minimum required by that Act. However, the Davis-Bacon Act "was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." *United States* v. *Binghamton Constr. Co.,* 347 U. S. 171, 176–177 (1954). That objective is clearly not "frustrated" when contractual arrangements between employers and their employees result in higher compensation and benefits than the floor established by the Act.

*Affirmed.*

MR. JUSTICE WHITE, dissenting.

Because petitioner, a general contractor, employed a nonunion subcontractor, who did not subscribe to the provisions of the collective-bargaining agreement, he was required to maintain records of the jobsite hours worked by the subcontractor's employees and to be "liable for payment of these employees [*sic*] wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement." Record 82–83. The Oregon Supreme Court described this language as making petitioner liable "for payments into the trust funds for the employees of the nonunion subcontractor." This means to me that the payments were on behalf of the subcontractor's employees. It also appears a straightforward reading of the contractual language that the "subcontractors . . . employees . . . contributions" be made by petitioner. Had the subcontractor been eligible to make these contributions, they surely would have been made for the benefit of his employees. The sensible inference from the contractual language is that the contractor, the petitioner, intended the same result. Common sense tells us that petitioner had no intention of making contributions with respect to employees who could never benefit.

As construed in this way, the provision is illegal because the employees of the noncontributing contractor may not be a beneficiary of the trust funds, even though the contributions are made with respect to them. But this would not be the first time that parties have drafted unenforceable contractual provisions, either by design, accident, or mistake.

I do not understand why the Court feels such compulsion to save the contract by construing it to mean that the payments at issue are not for the benefit of the contractor's employees at all and are not made on their behalf. The result of this construction is that in addition to the full contract price paid to the subcontractor, petitioner must pay into the trust funds 96 cents for each jobsite hour worked by the subcontractor's employees, these funds to be held for the employees of the contributing employers but excluding the subcontractor's employees. This is simply a penalty for employing a nonsignatory subcontractor, a penalty the Court creates in construing the contract as it does. With all due respect, I dissent and would reverse the judgment below.

# UNITED STATES v. DONOVAN ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-212. Argued October 13, 1976—Decided January 18, 1977

Title 18 U. S. C. § 2518 (1)(b)(iv), which is part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518 (8)(d) requires the judge to whom a wiretap application is made to cause to be served on the persons named in the wiretap order or application an inventory, which must give notice of entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted, and further provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice. Evidence derived from wiretaps must be suppressed under § 2518 (10)(a)(i) if "the communication was unlawfully intercepted." On December 26, 1972, the Government applied for an extension of an order authorizing a wiretap interception of gambling-related conversations of certain named individuals other than respondents Donovan, Robbins, and Buzzacco and "others as yet unknown" to or from four listed telephones, and the Government did not identify these respondents in the application even though it had previously learned they were discussing illegal gambling activities with the named subjects. The District Court authorized a 15-day interception. On February 21, 1973, the Government submitted to the court a proposed order giving notice of the interception to 37 persons, the court signed the order, and an inventory notice was served on the listed persons, including respondents Donovan, Robbins, and Buzzacco. Subsequently, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the court entered an amended order giving notice to those individuals, but as a result of "administrative oversight" respondents Merlo and Lauer were not included in either list of names and were never served with an inventory notice. Respondents, along with others, were indicted for federal gambling offenses. On respondents' motion, the District Court suppressed as to respondents Donovan, Robbins, and Buzzacco all evidence derived from the

December 26 intercept order on the ground that failure to name them in the application and order of that date violated § 2518 (1)(b)(iv), *inter alia,* and suppressed as to respondents Merlo and Lauer all evidence derived from both intercept orders on the ground that these two respondents had not been served with an inventory notice as required by § 2518 (8)(d). The Court of Appeals affirmed. *Held:*

1. Section 2518 (1)(b)(iv) is not satisfied when the wiretap application identifies only the "principal target" (usually the individual whose phone is monitored) of the interception, but the Government is required to name *all* individuals who it has probable cause to believe are engaged in the criminal activity under investigation and whose conversations it expects will be intercepted over the target telephone. Neither the language and structure of Title III nor its legislative history supports the interpretation that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application. Pp. 423–428.

2. Under § 2518 (8)(d), the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception. Here the Government did not comply adequately with § 2518 (8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge. Pp. 428–432.

3. Although the Government was required under § 2518 (1)(b)(iv) to identify respondents Donovan, Robbins, and Buzzacco in the December 26 application, failure to do so under these circumstances did not warrant suppression under § 2518 (10)(a)(i), since the identification in an intercept application of all those likely to be overheard in incriminating conversations does not play a "substantive role" with respect to judicial authorization of intercept orders and hence does not impose a limitation on the use of intercept procedures. Pp. 435–437.

(a) Here the statutorily imposed preconditions to judicial authorization (a determination that normal investigative techniques have failed or are unlikely to succeed, and probable cause to believe that (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception, and (iii) the target facilities are being used in connection with the specified criminal activity) were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations, the intercept being lawful because the application provided sufficient information to enable the judge to determine that the statutory preconditions were satisfied. Pp. 435–436.

(b) There is nothing in the legislative history to suggest that Congress intended § 2518 (1)(b)(iv)'s broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance," *United States* v. *Chavez*, 416 U. S. 562, 578. P. 437.

4. Nor was suppression justified under § 2518 (10)(a)(i) with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. Pp. 438–439.

(a) There is nothing in the structure or legislative history of the Act to suggest that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice under § 2518 (8)(d) as a result of the Government's failure to inform the court of their identities. P. 438.

(b) Here, at the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order, and the fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted. Pp. 438–439.

513 F. 2d 337, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined, in all but Part II–A of which BURGER, C. J., joined, and in Parts I and II of which STEVENS, J., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 440. MARSHALL, J., filed an opinion dissenting in part, in which BRENNAN, J., joined, *post*, p. 445. STEVENS, J., filed a statement concurring in part and dissenting in part, *post*, p. 451.

*Deputy Solicitor General Frey* argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, Harriet S. Shapiro, Sidney M. Glazer,* and *Marc Philip Richman.*

*Bernard A. Berkman* argued the cause for respondents Merlo et al. With him on the brief was *Joshua J. Kancel-*

*baum.* *Carmen A. Policy* argued the cause and filed a brief for respondent Buzzacco.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense and whose communications are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

## I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title III.[1] The application requested authorization to intercept

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[1] The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they

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the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

would place calls to and receive calls from various persons, three of whom were also named in the wiretap application.[2] The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others, as yet unknown," to and from the four listed telephones.[3]

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[2] The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

[3] The District Court's order was issued pursuant to 18 U. S. C. §§ 2518 (3), (4), which provide in pertinent part:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

[*Footnote 3 is continued on p. 419*]

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzacco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.[4] This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown," but it did not identify respondents Donovan, Buzzacco, and Robbins in this second application.[5]

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"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

[4] In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third telephone was discovered, the facts indicating that the newly discovered telephone was being used, to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

[5] The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as

The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.[6] The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzacco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer were not included in either list of names and were never served with inventory notice.[7]

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clearly erroneous the District Court's finding that respondent Buzzacco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

[6] An inventory notice *must* be served within a designated period of time upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

[7] Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications,

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzacco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).[8] On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had probable cause to believe that it would overhear Donovan, Robbins, and Buzzacco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from

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and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9).

[8] The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has been no trial on the charges with respect to the respondents.

the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.[9] Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzacco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).[10]

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 424 U. S. 907, and now reverse.

## II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

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[9] See n. 6, *supra*.

[10] Title 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

### A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States* v. *Kahn,* 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.[11]

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[11] Every Court of Appeals that has considered the issue has concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States* v. *Chiarizio,* 525 F. 2d 289, 292 (CA2 1975); *United States* v. *Bernstein,* 509 F. 2d 996 (CA4 1975), cert. pending, No. 74–1486; *United States* v. *Doolittle,* 507 F. 2d 1368 (CA5), aff'd en banc, 518 F. 2d 500 (1975), cert. pending, Nos. 75–500, 75–509, 75–513; *United States* v. *Civella,* 533 F. 2d 1395 (CA8 1976), cert. pending, Nos. 75–1813, 76–169; *United States* v. *Russo,* 527 F. 2d 1051, 1056 (CA10 1975), cert. denied, 426 U. S. 906 (1976). See also *United States* v. *Moore,* 168 U. S. App. D. C. 227, 235–236, 513 F. 2d 485, 493–494 (1975) (interpreting D. C. Code § 23–547 (a)(2)(D), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzacco argue, that our decision in *United States* v. *Kahn,* 415 U. S. 143 (1974), resolved this identification issue. See *United States* v. *Chiarizio, supra; United States* v. *Moore, supra.* Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn.* The question in that case was whether a wiretap application had to identify a known user of the target telephone whose com-

The United States argues that the most reasonable interpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is to be monitored."[12] Brief for United States 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.[13]

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the

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plicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

[12] The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for United States 18 n. 13.

[13] Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is [one] between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg. 13.

offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the *persons* named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving *any of the same persons* . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.[14]

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[14] Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would

Nor can we find support in the legislative history for the "principal target" interpretation. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger* v. *New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968). Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include a "full and complete statement of the facts concerning all previous applications . . . *involving any person named in the application* as committing, having committed, or being about to commit an offense." Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on Controlling Crime Through More Effective Law Enforcement, 90th Cong., 1st Sess., 77, § 8 (a)(3), and 1006, § 2518 (4)(a) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

S. 917 combined the major provisions of S. 675 and S. 2050 and eventually was enacted. While it was pending before the Senate Judiciary Committee, this Court decided *Katz* v. *United States*, 389 U. S. 347 (1967). S. 917 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the vari-

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not be served by limiting that notice on the basis of the telephone from which one speaks.

ous subdivisions of § 2518 (1)(b), including the identification requirement at issue here, were intended to "reflect . . . the constitutional command of particularization." S. Rep. No. 1097, *supra*, at 101, citing *Berger* v. *New York*, *supra*, at 58-60, and *Katz* v. *United States*, *supra*, at 354-356. The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress would hardly have read those cases as requiring the naming of all parties likely to be overheard.[15] Brief for United States 25-26. But to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Berger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded . . . ." *Ibid.* Given the statute at issue in *Berger* and our comment upon it, Congress may have concluded that the Constitution required the naming, in a wiretap application, of all suspects rather than just the primary user.[16]

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[15] At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States* v. *Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger* v. *New York*, 388 U. S., at 59.

[16] That Congress may have so understood the constitutional require-

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.[17] We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

### B

The other statutory provision at issue in this case is 18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of

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ment is also suggested by the portion of the Senate Report dealing with that provision of S. 917 that required the intercept *order* to "specify the identity, if known, of the individual whose communications are to be intercepted." The Senate Report merely cites *West* v. *Cabell,* 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

[17] At least one Senator read the identification requirement in S. 917 to parallel the identification requirement contained in the statute at issue in *Berger* v. *New York:* "Specificity is required as to the person or persons whose communications will be intercepted." 114 Cong. Rec. 14763 (1968) (remarks of Sen. Percy).

the application, and indicate whether communications were intercepted.[18] Although the statute mandates inventory notice only for persons named in the application or the order, the statute also provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.[19] Observing that this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, § 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate. In introducing that amendment, Senator Hart explained its purpose:

> "The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted communications, even though such

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[18] The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

[19] In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. § 2518 (8)(a). These notice and return provisions satisfy constitutional requirements. See *Katz* v. *United States,* 389 U. S. 347, 355-356, and n. 16 (1967); *Berger* v. *New York, supra,* at 60.

> parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485–14486 (1968).[20]

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

> "To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conver-

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[20] It is worth noting that shortly before Senator Hart proposed this amendment to S. 917, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report commented that parties to intercepted conversations other than those named in the application or order probably should be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks with his customers, and the latter are served with papers showing that A is being bugged . . . . [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

> sations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his [statutory] § 2518 (8)(d) discretion, . . . the government is [also] required to furnish such information as is available to it." *United States* v. *Chun,* 503 F. 2d 533, 540 (1974). (Footnote omitted.)

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.[21]

Currently, the policy of the Justice Department is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for United States 39. Because it fails to assure that the necessary range of information will be before the issuing judge, this policy does not meet the test set out in *Chun*. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518 (8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge.

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[21] At oral argument, counsel for the United States recognized the merit of the approach specified in *United States* v. *Chun:*

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this area." Tr. of Oral Arg. 6-7.

## III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1)(b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that the authorization orders are facially insufficient, or that the interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: Were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)? [22]

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[22] The availability of the suppression remedy for these statutory,

Resolution of that question must begin with *United States* v. *Giordano,* 416 U. S. 505 (1974), and *United States* v. *Chavez,* 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *Id.,* at 574–575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substan-

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as opposed to constitutional, violations, see nn. 15 and 19, *supra,* turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States* v. *Giordano,* 416 U. S. 505, 524 (1974).

The concurring opinion of THE CHIEF JUSTICE contends that respondents Donovan, Robbins, and Buzzacco lack standing even to seek suppression. *Post,* at 440–441. This contention rests on the ground that Congress rejected an amendment proposed by Senators Long and Hart that would have added a fourth ground justifying suppression—namely, that the person against whom the Government sought to introduce the evidence was not named in the court order. Since these three respondents would have been entitled to suppression under the rejected amendment, the concurring opinion concludes they cannot seek suppression here. This view fails to recognize that § 2518 (10) (a) establishing the suppression remedy provides *alternative* grounds on which one can seek suppression of evidence derived from a wiretap. Thus, the mere fact that Congress chose not to add a fourth alternative could not mean that it intended to prevent persons who would have been covered by that alternative from seeking suppression on one of the other grounds. As the Justice Department commented, in the same statement cited in the concurring opinion: "The [Long and Hart] amendment is designed to limit the scope of electronic surveillance, but it accomplishes this purpose in an artificial manner. *So long as a court order is validly obtained,* evidence obtained under the order should be admissible against any person not merely against the person named in the order." 114 Cong. Rec. 14718 (1968) (emphasis added). Here, respondents Donovan, Robbins, and Buzzacco challenge the validity of the court order, and nothing in either Congress' rejection of the proposed amendment or the Justice Department's comment thereon suggests that § 2518 (10) (a) (i) is unavailable to persons who might have had a remedy under a provision not enacted by Congress.

tially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Giordano, supra,* at 527.

*Giordano* concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10)(a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2518 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

### A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and consequently imposes a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity; (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. §§ 2518 (3)(a–d). That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is unlike *Giordano,* where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.[23] Rather, this case resembles *Chavez,* where we held that a wiretap was not unlawful simply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.[24]

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[23] There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzacco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzacco were among the 37 persons served with the initial inventory.

[24] No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *United States* v. *Kahn,* 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzacco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg. 40. Although law enforcement officials can often take action without a warrant when they have

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States* v. *Chavez,* 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 917, contained an identification provision. See *supra,* at 426. The only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(b) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.[25]

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been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause, and it is suggested that the same principle applies here. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

[25] Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10)(a)(i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a district court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing

### B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order or the application." The Senate Report detailed the purpose of that provision:

> "[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached

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in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10)(a)(i)—resulting in suppression under § 2515—for failure to name additional targets.

39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.[26]

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.

## IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzacco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States* v. *Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

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[26] Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, Tr. of Oral Arg. 32, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 7, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

*It is so ordered.*

MR. CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I concur in the Court's judgment and in all except Part II-A of the Court's opinion. I cannot agree, however, with the Court's construction of the identification provisions of § 2518 (1)(b)(iv), since I believe the application for surveillance in this case complied with statutory requirements. However, the precise reach of the identification requirement is irrelevant, because respondents are foreclosed from seeking suppression in any event.

Respondents Donovan, Robbins, and Buzzacco contend that, since their names were not contained in the wiretap application, suppression is required under the express exclusionary provision of Title III, § 2518 (10)(a). Their contention flies in the teeth of legislative history directly to the contrary. In the evolution of Title III, Congress considered and rejected a proposed amendment which would have expressly conferred the exclusionary benefit that respondents now seek. Specifically, Senators Long and Hart proposed the addition of a fourth subdivision to the suppression provision contained in § 2518 (10)(a). 114 Cong. Rec. 14718 (1968). Had that proposal been adopted, it would have allowed suppression of intercepted conversations at the behest of any aggrieved person on the ground that he or she was not named in the application or extension.[1] In its comment on the proposal, the Department of Justice said:

> "The amendment would permit intercepted communications to be used in evidence *only against the persons named in the court order, not against other persons.*" *Ibid.* (Emphasis supplied.)

Consistent with the Justice Department's recommendation, the Senate rejected the result which respondents now seek.

Even if the legislative history were silent with respect to suppression, however, I would nonetheless take issue with the Court's analysis of the identification requirement. In my view, Congress required no more than that a wiretap application identify by name the primary user of the monitored facility.

Congress drafted this statute with exacting precision. As its principal sponsor, Senator McClellan, put it:

> "[A] bill as controversial as this . . . requires close attention to the dotting of every 'i' and the crossing of every 't' . . . ." *Id.*, at 14751.

Under these circumstances, the exact words of the statute provide the surest guide to determining Congress' intent, and we would do well to confine ourselves to that area. The statutory provision before us requires the wiretap application to specify the "identity of *the* person, if known, committing the offense and whose communications are to be intercepted." 18 U. S. C. § 2518 (1)(b)(iv). (Emphasis supplied.) As the Court correctly indicates, the identification requirement was carefully added in the wake of *Berger* v. *New York*, 388 U. S. 41 (1967). That case involved the constitutionality of a New York statute requiring the naming of "the person *or persons* whose communications . . . are to be overheard." That very different statute plainly put Congress on notice that an identification provision could call, as did New York's, for the naming of multiple parties. Indeed, while requiring only the identification of "*the* person" whose communications are to be intercepted, Congress anticipated the obvious fact that interceptions effected pursuant to a single application and order could potentially affect a large number of persons. Standing to object to intercepted communications is conferred upon "[a]ny aggrieved person . . . ." § 2518 (10)(a). In addition, a civil damages remedy is conferred upon "[a]ny person" whose communications are unlawfully intercepted or used in violation of the statute. Thus, in fashioning highly specific requirements with respect to wiretap applications, Congress failed to employ language found in other parts of the same statute and so carefully written into the state statute at issue in the *Berger* case.

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[1] The proposed addition provided:

"(iv) That he was not the subject of such application, authorization, or extension thereof."

It is true that the proposal did not speak directly to instances, such as here, where persons arguably should have been named in the application and order, but were not. But respondents, as unnamed persons, would plainly have had a suppression remedy if the amendment had passed.

The Court emphasizes, however, that the statute expressly recognizes that more than one person *may* be named in a wiretap application. *Ante*, at 425. That is indeed true. See §§ 2518 (1)(e), (8)(d). But I would think this is all the more reason for focusing upon the precise language in the provision establishing explicit *requirements* for an application. Since Congress expressly contemplated that applications might contain more than one name, its failure in § 2518 (1)(b)(iv) to require the naming of "any person" or "the persons" whose communications are to be intercepted must mean that an open-ended identification requirement was never intended. In other words, Congress reasonably foresaw that, for a variety of reasons, actual wiretap applications might contain the names of more than one person. But Congress did not translate its recognition of what an application *might* reasonably contain into a command as to what it *must* contain.

Assuming that plain words of a statute might have to bow, in some circumstances, to compelling legislative history to the contrary, nothing of that kind is found here. As the Court observes, the earlier bills introduced in the Senate contained no identification provision at all. After *Berger* and *Katz* v. *United States,* 389 U. S. 347 (1967), were decided, the requirement was added in what was plainly an abundance of caution. For this Court in *Berger* flatly discounted any value in New York's broad identification requirement.

> "It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded . . . .' *But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized."* 388 U. S., at 59. (Emphasis supplied.)

As shown by its rejection of the proposed suppression provision—which obviously would have had the practical effect of increasing the number of persons identified in wiretap applications—Congress correctly perceived little value in multiplying indefinitely the number of names to be set forth in wiretap applications and orders. This is particularly true since no Fourth Amendment values are served by a sweeping identification requirement. The Court has made clear:

> " 'The Fourth Amendment requires a warrant to describe only "the place to be searched, and the persons or things to be seized," *not the persons from whom things will be seized.'* " *United States* v. *Kahn,* 415 U. S. 143, 155 n. 15 (1974). (Emphasis supplied.)

Hence, the statute, as it presently stands, comports entirely with Fourth Amendment requirements, and thus achieves the express legislative purpose of " 'reflect[ing] the constitutional commands of particularization.' " *Ante*, at 427. Under those circumstances, it ill serves this Court to speculate that our coequal branch of Government, despite the clear teaching of the Constitution, incorrectly surmised "that the Constitution [may have] required the naming . . . of all suspects rather than just the primary user." *Ibid.* In any event, if our own decisions have created confusion in the Congress, which is not surprising, nothing is gained by perpetuating that confusion in the face of Congress' clear intent to comply with this Court's interpretation of the Fourth Amendment.

In short, the Court has redrafted a statute passed by Congress to make it identical to a statutory provision found valueless by this Court a few years ago in the *Berger* case. This undertaking, unfortunately, is not entirely without consequence, notwithstanding the Court's refusal to approve suppression of the evidence here. Among other things, federal officers are potentially subject to a civil damages action, with compensatory damages of not less than $1,000, plus punitive damages, plus reasonable attorneys' fees.[2] Nor is this federal remedy exclusive. State-provided damages remedies are not pre-empted. S. Rep. No. 1097, 90th Cong., 2d Sess., 107 (1968). Damages awards aside, the Court's opinion—albeit in dictum—hints that suppression may indeed be in the offing if an intentional "violation" is shown. Finally, district judges will now be put to the task, at least in some cases, of determining whether probable cause exists with respect to each person listed in the application. § 2518 (3)(d). Judges may well wonder why such burdens are imposed upon them for a gain which the Court found illusory in the *Berger* case.

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[2] 18 U. S. C. § 2520. Since a court order will necessarily reflect the officers' "violation," it is not entirely certain that reliance upon a court order will provide a sufficient defense to a civil damages action.

I would therefore interpret this statute to mean just what it says and no more. Wisely or not, Congress decided, consistent with Fourth Amendment strictures, to require only the identification of "the person" whose conversations are to be intercepted. Since Congress demonstrably knew how to use other language when it so chose, I would take Congress at its word and not try to "improve" on its draftsmanship.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

The Court today holds that an application for a warrant to authorize a wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, must name all individuals who the Government has probable cause to believe are committing the offense being investigated and will be overheard. See 18 U. S. C. § 2518 (1)(b)(iv). It also holds that the Government must provide sufficient information to the issuing judge to allow him to exercise the discretion provided by 18 U. S. C. § 2518 (8)(d). I fully agree with both of these holdings. The Court concludes, however, that if the Government violates these statutory commands, it is nevertheless free to use the intercepted communications as evidence in a criminal proceeding. I cannot agree.

I continue to adhere to the position, expressed for four Members of the Court by Mr. Justice Douglas in his dissent in *United States* v. *Chavez,* 416 U. S. 562, 584–585 (1974), that Title III does not authorize "the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is 'substantive,' 'central,' or 'directly and substantially' related to the congressional scheme." The Court has rejected that argument, however, see *United States* v. *Chavez, supra; United States* v. *Giordano,* 416 U. S. 505 (1974), and nothing is to be gained by renewing it here. But even under the standard set forth in *Giordano* and *Chavez* and reaffirmed by the Court today, *ante*, at 433–434, the evidence at issue here should be suppressed.

## I

Title III requires that an application for a warrant to authorize wiretapping disclose "the identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U. S. C. § 2518 (1)(b)(iv). The Court properly rejects the Government's contention that this provision requires it to name only the "principal target" of an investigation. In doing so, the Court relies both on the plain language and legislative history of the section, which do not support the Government's position, and on the statutory context. *Ante*, at 424–428. Part of that context is the obvious assumption of other portions of Title III that wiretap applications will name more than one target. See 18 U. S. C. §§ 2518 (1)(e), (8)(d). Another part is

> "the fact that identification of an individual in an application for an intercept order *triggers other statutory provisions*. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications 'involving any of the same persons . . . specified in the application.' . . . Second, § 2518 (8)(d) mandates that an inventory notice be served upon 'the persons named in the order or the application.'" *Ante*, at 425 n. 14 (emphasis added).

Yet in determining whether the identification requirement "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures," *United States* v. *Giordano*, *supra*, at 527, or plays a "substantive role" in the "regulatory system" established by Congress, *United States* v. *Chavez*, *supra*; at 578, the Court ignores the requirement's function as a statutory "trigger." In its analysis, the Court focuses solely on whether a list of additional names would affect a judge who must decide whether to issue a warrant. The Court reasons that once the judge has concluded that the specific requirements of § 2518 (3) [1] have been met, the presence of additional names in the warrant application could not change his decision. *Ante*, at 435-436. Failure to provide those names is, therefore, insignificant.

The Court's reasoning is doubly flawed. First, a judge is not required to issue a warrant if the prerequisites of § 2518 (3) are satisfied; he *may* do so. Once he determines that the § 2518 (3) requirements have been met, he still must decide whether the invasion of privacy by the proposed wiretap is justified under the circumstances.[2] Second, what is at issue here is more than a simple list of names. Section 2518 (1)(e) requires that the Government disclose to the court the history of all prior applications to intercept the communications of anyone named in a warrant application.

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[1] Title 18 U. S. C. § 2518 (3) provides, in pertinent part:

"Upon such application the judge may enter an ex parte order . . . if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

[2] The information which the applicant is required to provide to the district court by §§ 2518 (1)(d)-(f) would be superfluous if the decision whether to issue a warrant depended only on the findings specified in § 2518 (3).

A history of recent applications would at the least cause a judge to consider whether the application before him was an attempt to circumvent the restrictive rulings of another judge or to continue an unjustified invasion of privacy.[3] The decision whether to issue the warrant would certainly be affected by such consideration.[4]

It is true, as the Court notes, *ante*, at 436 n. 23,[5] that there is no allegation in this case that had the District Court been informed that the Government expected to overhear respondents Donovan, Buzzacco, and Robbins discussing illegal gambling activities it would not have issued a warrant. But that fact is irrelevant to an analysis of the role of the naming requirement in the regulatory system established by Congress. In *Giordano,* the Court rejected the argument that the Attorney General's failure to authorize the application for a warrant could be disregarded because the Attorney General had later ratified the application, thus demonstrating that he would have approved it originally. 416 U. S., at 523–524, n. 12. The important consideration was whether the requirement of high-level authorization was designed to play an important role, not whether it would have mattered in the particular case. The same analysis should be used here.

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[3] Cf. *United States* v. *Bellosi,* 163 U. S. App. D. C. 273, 501 F. 2d 833 (1974).

[4] Thus, this case is unlike *United States* v. *Chavez.* There, the Court concluded that the misidentification of the authorizing official as an Assistant Attorney General when the Attorney General had actually authorized the warrant application could not have affected the judge's decision to issue the warrant. 416 U. S., at 572.

[5] The Court actually states only that there is no suggestion that the failure to name respondents kept from the judge information "that might have prompted the court to conclude that probable cause was lacking." As I have shown, that formulation understates the District Court's role.

Moreover, even where there is no prior interception or application to disclose, as is apparently the case here, the naming requirement plays a vital role in the system designed by Congress. For unless that requirement is complied with from the first interception, no judge will know that a later interception is not the first. In addition, the naming requirement triggers the mandatory notification provision of § 2518 (8)(d), another important component of the congressional design.[6]

Thus, I conclude that the naming requirement recognized by the majority does play a "substantive role" in the system designed by Congress to limit the use of electronic surveillance. Failure to comply with that requirement, therefore, should lead to suppression on the ground that "the communication was unlawfully intercepted." 18 U. S. C. § 2518 (10)(a)(i).

## II

The Court's discussion of the consequences of the Government's failure to comply with the notice provision of § 2518 (8)(d) parallels its discussion of the naming requirement, and is similarly flawed. The Court does recognize that the notice provision was designed to assure the community that the wiretap technique is reasonably employed and that "Congress placed considerable emphasis on that aspect of the overall statutory scheme." *Ante,* at 439. But because notice occurs after the intercept is completed, and because notice is not itself "an independent restraint on resort to the wiretap procedure," the Court concludes that failure to notify does not render an interception "unlawful" under § 2518 (10)(a)(i). *Ante,* at 439.

Again, the Court takes too narrow a view of the provision at issue, ignoring its place in the system Congress has created to restrain wiretapping. That system involves not only direct restraints on applying for a warrant, but also restraints which reduce wiretaps by providing sanctions for misuse of surveillance techniques. Those sanctions are both criminal, 18 U. S. C. § 2511 (1), and civil, 18 U. S. C. § 2520. Congress designed the notice provisions of § 2518 (8)(d) to provide the information necessary to make the civil sanctions of § 2520 meaningful. The congressional analysis of § 2520 states:

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[6] See Part II, *infra.*

> "Injunctive relief, with its attendant discovery proceedings, is not intended to be available . . . . It is expected that civil suits, if any, will instead grow out of the filing of inventories under section 2518 (8)(d)." S. Rep. No. 1097, 90th Cong., 2d Sess., 107 (1968).

See also *id.*, at 105.

The Court's conclusion that the notice provision is not central dismantles this carefully designed congressional structure.

## III

The Court's opinion implies that if the violations of Title III considered here had been intentional, the result would be different. *Ante,* at 436 n. 23, 439 n. 26. This must be so, for surely this Court would not tolerate the Government's intentional disregard of duties imposed on it by Congress. I also assume that if the Government fails to establish procedures which offer reasonable assurance that it will strictly adhere to the statutory requirements, see *ante,* at 439–440, resulting failures to comply will be recognized as intentional. There is, therefore, reason to hope that the Court's admonition that the Government should obey the law will have some effect in the future.

But that hope is a poor substitute for certainty that the Government will make every effort to fulfill its responsibilities under Title III. We can obtain that certainty only by according full recognition to the role of the naming and notice requirements in the statutory scheme created by Congress. I respectfully dissent from the Court's failure to do so.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

For the reasons stated in Parts I and II of MR. JUSTICE MARSHALL's opinion, I respectfully dissent from Parts III and IV of the Court's opinion. I join Parts I and II of the Court's opinion.

# UNITED STATES ET AL. *v.* COUNTY OF FRESNO

## APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

No. 75-1262. Argued November 8-9, 1976—Decided January 25, 1977*

Pursuant to California statutes authorizing counties to impose an annual use or property tax on possessory interests in improvements on tax-exempt land, appellee counties imposed a tax on the possessory interests of appellant United States Forest Service employees in housing located in national forests within the counties and owned and supplied to appellants by the Forest Service as part of their compensation. *Held:* The tax is not barred by the Supremacy Clause as a state tax on the Federal Government or federal property. Pp. 457-468.

(a) A State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen and as long as it is the possession or use by the private citizen that is being taxed. *City of Detroit* v. *Murray Corp.*, 355 U. S. 489; *United States* v. *City of Detroit,* 355 U. S. 466; *United States* v. *Township of Muskegon,* 355 U. S. 484. P. 462.

(b) The economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional as long as the tax is imposed equally on the other similarly situated constituents of the State. Pp. 462-464.

(c) The "legal incidence" of the tax in question falls neither on the Federal Government nor on federal property but is imposed solely on private citizens who work for the Federal Government and threatens to interfere with federal laws relating to the Forest Service's functions *only* insofar as it may impose an economic burden on the Forest Service to reimburse its employees for the taxes owed or, failing reimbursement, to remove an advantage otherwise enjoyed by the Government in the employment market. P. 464.

(d) The tax does not discriminate against Forest Service or other federal employees, and the fact that it is imposed on real property renters only if the owner is exempt from taxation does not make it discriminatory, *United States* v. *City of Detroit, supra.* Since the state property tax imposed on owners of nonexempt property is passed on to their lessees, appellants are no worse off than those who work

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*Together with *United States et al.* v. *County of Tuolumne,* also on appeal from the same court (see this Court's Rule 15 (3)).

for private employers and rent houses in the private sector. Pp. 464-465.

(e) It cannot be properly contended that appellants are required to occupy their houses for the Forest Service's sole benefit and not for their own personal benefit, since the occupancy of the houses constitutes part of appellants' "compensation" for services performed and thus concededly is of personal benefit to the employee, and since moreover the Forest Service itself purports to measure the personal benefit of the occupancy to the employee and collects rent in such an amount through deductions from the employee's paycheck. Pp. 465-467.

50 Cal. App. 3d 63[illegible] 123 Cal. Rptr. 548 (*County of Fresno* judgment) and *County of Tuo[illegible]umne* judgment affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 468.

*Howard E. Shapiro* argued the cause for the United States et al. On the brief were *Solicitor General Bork, Assistant Attorney General Crampton, Stuart A. Smith, Crombie J. D. Garrett,* and *David English Carmack.*

*James B. Waterman* argued the cause for appellee County of Fresno. With him on the brief was *Robert M. Wash. Stephen Dietrich, Jr.,* argued the cause and filed a brief for appellee County of Tuolumne.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether, consistent with the Federal Government's immunity from state taxation inherent in the Supremacy Clause of the United States Constitution, see *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), the State of California may tax federal employees on their possessory interests in housing owned and supplied to them by the Federal Government as part of their compensation. We hold that it may.

## I

The individual appellants in this case are employees of the Forest Service, a branch of the United States Department of Agriculture responsible for administering the national forests. These appellants work in the Sierra, Sequoia, and Stanislaus National Forests which are located in Fresno and Tuolumne Counties in California. During the year 1967 each appellant lived with his family in a house which was built and owned by the Forest Service in one of these national forests. Appellants were required by the Forest Service to live in these houses[1] so that they would be nearer to the place where they performed their duties and so that they would be better able to perform those duties. Structurally, the houses were very similar to residential houses of the same size available in the private sector. The Forest Service viewed the occupancy of these houses as partial compensation for the services of its employees, and made a deduction from the salary of the employee for each two-week pay period in which the employee occupied such a house. The Forest Service fixed the amount of the deduction by estimating the fair rental value of a similar house in the private sector and then discounting that figure to take account of the distance between the Forest Service house and the nearest established community and the absence, if any, of any customary amenities in or near the house.[2] Adjustment was

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[1] Some of the appellants were not required but simply permitted to live in houses owned by the Forest Service, in the sense that these particular appellants might have been able to live in a privately owned house outside the forest if they had so elected. However, the Forest Service required that *some* employee occupy each house owned by the Forest Service, and if no employee had volunteered, some employee, perhaps including some of these appellants, would have been required to live there. In light of our disposition of this case, the distinction between employees required to live in Forest Service housing and those permitted to live there is unimportant and we will not refer to it again.

[2] Examples of the amenities considered are, according to the testimony of a Forest Service official:

"Paved streets, street lighting at least at intersections, sidewalks, lawns, trees and landscaping, general attractiveness of the neighborhood, community sanitation services, reliability and adequacy of water safe for house-also made for the fact that the Forest Service reserved the right to remove employees from their houses at any time, to enter the houses with or without notice for inspection purposes, and to use part or all of the houses for official purposes in an emergency.

Pursuant to 16 U. S. C. § 480, the States retain civil and criminal jurisdiction over the national forests notwithstanding the fact that the national forests are owned by the Federal Government. Under the California Revenue and Taxation Code, §§ 104, 107 (West 1970), and § 21 (b) of Title 18 of the California Administrative Code (1971), counties in California are authorized to impose an annual use or property tax on possessory interests in improvements on tax-exempt land.[3]

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hold use, reliability of [*sic*] adequacy of electrical service, reliability and adequacy of telephone service, reliability and adequacy of fuel for heating, hot water and cooking, police protection, fire protection, unusual design features of a dwelling, absence of disturbing noises or offensive odors and standards of maintenance." App. 32.

[3] Section 107, Cal. Rev. & Tax. Code (West 1970), provides:

"'Possessory interests' means the following:

"(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person."

Title 18 Cal. Adm. Code § 21 (b) (1971) provides:

"'Taxable possessory interest' means a possessory interest in nontaxable publicly owned real property, as such property is defined in section 104 of the Revenue and Taxation Code . . . ."

Section 104, Cal. Rev. & Tax. Code (West 1970), provides:

"'Real estate' or 'real property' includes:

"(a) The possession of, claim to, ownership of, or right to the possession of land."

All parties agree that the national forests owned by the Federal Government are tax-exempt land by reason of the Supremacy Clause of the United States Constitution, *e. g., United States* v. *Allegheny County*, 322 U. S. 174 (1944), and that no tax may be imposed either on the land itself or on the United States.

With respect to non-tax-exempt land, California imposes a property tax on the owner. No tax is imposed directly on a renter of non-tax-

The Counties of Fresno and Tuolumne imposed such a tax on the appellants—Forest Service employees who live in the federally owned houses in the national forests located in those counties. In computing the value of the possessory interests on which the tax is imposed, the counties used the annual estimated fair rental value of the houses, discounted to take into account essentially the same factors considered by the Forest Service in computing the amount that it deducted from the salaries of employees who used the houses.[4]

Appellants paid the taxes under protest and they, together with the United States, sued for a refund in California courts in Fresno and Tuolumne Counties. They claimed, *inter alia*, that the tax interfered with a federal function—*i. e.*, the running of the Forest Service—that it discriminated against employees of the Federal Government, and that it was therefore forbidden by the Supremacy Clause of the United States Constitution. *E. g.*, *M'Culloch* v. *Maryland*, *supra*. The trial courts each sustained appellants' claims, holding, *inter alia*, that appellants had no taxable possessory interest under state law. The California Court of Appeal, Fifth Appellate District, reversed, 50 Cal. App. 3d 633, 123 Cal. Rptr. 548 (1975) (*County of Fresno* case, followed in *County of Tuolumne* case (unreported)). It held that each appellant had a possessory interest in the houses owned by the Forest Service that was subject to taxation under state law. The court then held that the tax on such possessory interests is not a tax on the Federal Government, on Government property, or on a "federal function." Rather, it is a tax imposed on "the private citizen, and it is the

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exempt land. However, the tax on the owner is presumably reflected in the rent and the renter may thus pay the tax indirectly.

[4] In computing the value of appellants' possessory interests on which the tax was imposed, Fresno County used the value of one year of occupancy. Tuolumne County used the present discounted value of five years' occupancy—the length of time which it estimated the average Forest Service employee remained in a Forest Service house.

private citizen's usufructuary interest in the government land and improvements alone that is being taxed. (*City of Detroit* v. *Murray Corp.,* 355 U. S. 489 . . . ; *United States* v. *Township of Muskegon,* 355 U. S. 484 . . . ; *United States* v. *City of Detroit,* 355 U. S. 466 . . . .)" *Id.,* at 640, 123 Cal. Rptr., at 552. Consequently, the court held, the tax is not barred by the Supremacy Clause of the Federal Constitution. The California Court of Appeal also rejected appellants' contention that the tax operates to discriminate against the Federal Government and its employees. The Supreme Court of California denied review. We noted probable jurisdiction to review the decision of the California Court of Appeal, 425 U. S. 970 (1976).

Appellants argue that the tax is "a levy upon the activities of the United States" because the occupancy of the houses by the Forest Service employees was "for the sole purpose of discharging their governmental function of running the national forests." Brief for Appellants 11. Consequently, the Government argues, the tax is forbidden by the doctrine announced in *M'Culloch* v. *Maryland,* that under the Supremacy Clause of the Federal Constitution the States may not tax the properties, functions, or instrumentalities of the Federal Government. We disagree with the Government, and affirm the judgment below.

## II

The Government relies principally on the landmark case of *M'Culloch* v. *Maryland.* There the State of Maryland imposed a tax on notes issued by "any Bank . . . established without authority from the State."[5] The only such bank in Maryland was the Bank of the United States, created and incorporated by Act of Congress in order to carry out Congress' enumerated powers. No similar tax was imposed on the issuance of notes by any other bank in Maryland. The Court held the tax to violate that part of the Federal Constitution which declares that the laws of the United States are the "supreme law of the land." An Act of Congress had created the bank in order to carry out functions of the National Government enumerated in the United States Constitution. The Court noted that the power to tax the bank "by the States may be exercised so as to destroy it," 4 Wheat., at 427, and consequently that the power to tax, if admitted, could be exercised so as effectively to repeal the Act of Congress which created the bank. If the State's power to tax the bank were recognized in principle, the Court doubted the ability of federal courts to review each exercise of such power to determine whether the tax would or would not destroy a federal function. Finally, the Court rejected the State's argument that the power to tax involves the power to destroy only where the taxing power is abused, and that the Court should simply trust the States not to abuse their power to tax a federal function just as it must trust a State not to abuse its power to tax its own citizens. The Court rejected the argument because the political check against abuse of the power to tax a State's constituents is absent when the State taxes only a federal function.[6] A State's constituents can

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[5] The tax was in the form of a forced purchase from a state official of stamped paper on which such notes were required to be printed. The tax could be avoided by an annual lump-sum payment to the state official of $15,000.

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[6] The Court stated:

"[Normally in] imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

"The people of a State, therefore, give to their government a right of taxing themselves and their property, . . . resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." 4 Wheat., at 428.

". . . When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State be relied on to vote out of office any legislature that imposes an abusively high tax on them. They cannot be relied upon to be similarly motivated when the tax is instead solely on a federal function.

The Court was careful to limit the reach of its decision. It stated that its opinion does not

> "extend to a tax . . . imposed on the interest which the citizens of Maryland may hold in this institution [the bank], *in common with other property of the same description throughout the State.*" *Id.*, at 436. (Emphasis added.)

Since *M'Culloch,* this Court has adhered to the rule that States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government.[7] The decisions of

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taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control." *Id.*, at 435.

Accordingly, the Court concluded:

"The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *Id.*, at 436.

[7] Thus the Court invalidated a state law which required a seller of liquor to United States post exchanges to collect a markup—the practical equivalent of a tax—from the post exchange and to remit it to the State Tax Commission. *United States* v. *Mississippi Tax Comm'n,* 421 U. S. 599 (1975). There, although the tax was nominally collected from the seller, the legal incidence of the tax was said to fall on the United States because *state law* required it to be charged to and collected from the United States by the seller. See *First Agricultural Nat. Bank* v. *Tax Comm'n,* 392 U. S. 339 (1968). *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110 (1954), heavily relied on by appellants, also stands only for the proposition that the State may not impose a tax the legal incidence of which falls on the

this Court since *M'Culloch* have been less uniform on the question whether taxes, the economic but not the legal incidence of which falls in part or in full on the Federal Government, are invalid.

For many years the Court read the decision in *M'Culloch* as forbidding taxes on those who had contractual relationships with the Federal Government or with its instrumentalities whenever the effect of the tax was or might be to increase the cost to the Federal Government of performing its functions.[8] In later years, however, the Court departed from this interpretation of *M'Culloch*. In *James* v. *Dravo Contracting Co.,* 302 U. S. 134 (1937), a contractor sought immunity from a state occupation tax measured by the gross receipts, insofar as those receipts had been received under a contract with the Federal Government. The Court declared the tax valid even if "the gross receipts tax may increase the cost to the Government" under the contract. *Id.,* at 160. So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory, *id.,* at 150, or until Congress declares otherwise. *Id.,* at 161. Similarly, in *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466 (1939), the Court sustained a nondiscriminatory tax on the income of a federal employee, thereby overruling *Dobbins* v. *Commis-*

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Federal Government. *Id.,* at 122. There the State imposed a sales tax on purchasers. Kern-Limerick, Inc., had a cost-plus contract with the Department of the Navy which provided that all purchases made in furtherance of the contract were made by the Department of the Navy, with Kern-Limerick acting only as its agent. The Court held that the question of who was the purchaser for state-tax purposes was a federal question, and it held the Department of the Navy to be the purchaser and the tax to be thus unenforceable. See also *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95 (1941); *Van Brocklin* v. *Tennessee,* 117 U. S. 151 (1886).

[8] *E. g., Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435 (1842) (holding unconstitutional a state tax on the income of a federal employee); *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218 (1928) (hold-

*sioners of Erie County,* 16 Pet. 435 (1842).[9] See also *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941), overruling *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218 (1928).

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ing unconstitutional a sales tax imposed on one who made sales to the Federal Government); *Gillespie* v. *Oklahoma,* 257 U. S. 501 (1922) (holding unconstitutional a state income tax as it applied to income generated from property leased from the Federal Government). See also *United States* v. *Rickert,* 188 U. S. 432 (1903).

[9] In *Graves,* the Court said:

"The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." 306 U. S., at 480.

"[T]he only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the *economic burden* of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.,* at 481. (Emphasis added.)

The Court rejected this economic burden as a justification for immunizing the employee from income taxation:

"[T]he purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

. . . . .

"[A] non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which [a government entity] had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials." *Id.,* at 483–484.

"So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of

Finally, and for the purposes of this case dispositively, in *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958), *United States* v. *City of Detroit*, 355 U. S. 466 (1958), and *United States* v. *Township of Muskegon*, 355 U. S. 484 (1958), this Court sustained state use taxes on the use by private companies of machinery and other property owned by the United States and leased to them for use in their businesses—even though in two of these cases the companies had cost-plus contracts with the Government requiring the Government to reimburse them for state taxes paid by them. These cases make clear that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed. See also *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495 (1953).

The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State.[10] This rule re-

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the organization within the same territory of two governments, each possessing the taxing power." *Id.*, at 487.

[10] The single arguable departure from this principle since 1937 is *United States* v. *Allegheny County*, 322 U. S. 174 (1944). There the Mesta Machine Company had a contract with the Federal Government to produce field guns for the War Department during 1941. Some of the machinery with which Mesta produced the guns was owned by the United States and was in the possession of Mesta. There were limitations on Mesta's right to use this machinery: Mesta's "leasehold interest [in the machines] is subject to some qualification of the right to use the property except for gun manufacture . . . and is perhaps burdened by other contractual conditions." *Id.*, at 186–187. Pennsylvania, the State in which Mesta's factory was located, imposed a property tax on Mesta's land and machinery attached thereto, including the machinery owned by the United States. This Court ruled the tax invalid,

turns to the original intent of *M'Culloch* v. *Maryland.* The political check against abuse of the taxing power found lacking in *M'Culloch,* where the tax was imposed solely on the Bank of the United States, is present where the State imposes a nondiscriminatory tax only on its constituents or their artificially owned entities;[11] and *M'Culloch* foresaw the unfairness in forcing a State to exempt private individuals with beneficial interests in federal property from taxes imposed on similar interests held by others in private property. Accordingly, *M'Culloch* expressly excluded from its rule a tax on "the interest which the citizens of Maryland may hold

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stating: "Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. . . . [T]he state has made no effort to segregate Mesta's interest [in the machinery] and tax it. The full value of the property including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment." *Ibid.*

Insofar as *United States* v. *Allegheny County, supra,* holds that a tax measured by the value of Government-owned property may never be imposed on a private party who is using it, that decision has been overruled by *United States* v. *City of Detroit,* 355 U. S. 466 (1958), and its companion cases. See *id.,* at 495 (Frankfurter, J., concurring and dissenting). Insofar as it stands for the proposition that Government property used by a private citizen may not be taxed at its full value where contractual restrictions on its use for the Government's benefit render the property less valuable to the user, the case has no application here. Appellee counties have sought to tax only the individual appellants' interests in the Forest Service houses and have reduced their assessments to take account of the limitations on the use of the houses imposed by the Government.

[11] A tax on the income of federal employees, or a tax on the possessory interest of federal employees in Government houses, if imposed only on them, could be escalated by a State so as to destroy the federal function performed by them either by making the Federal Government unable to hire anyone or by causing the Federal Government to pay prohibitively high salaries. This danger would never arise, however, if the tax is also imposed on the income and property interests of all other residents and voters of the State.

[in a federal instrumentality] in common with other property of the same description throughout the State." 4 Wheat., at 436.

## III

Applying the rule set forth above, decision of this case is relatively simple. The "legal incidence" of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service—causing it to reimburse its employees for the taxes legally owed by them or, failing reimbursement, removing an advantage otherwise enjoyed by the Federal Government in the employment market.[12] There is no other respect in which the tax involved in this case threatens to obstruct or burden a federal function. The tax can be invalidated, then, only if it discriminates against the Forest Service or other federal employees, which it does not do.[13]

Although the tax is imposed by the appellee counties on renters of real property only if the owner is exempt from taxation—and consequently is not imposed on the vast majority of renters of real property in California—the tax is not for that reason discriminatory. In this respect this case is governed by *United States* v. *City of Detroit*, 355 U. S. 466 (1958). There the city of Detroit imposed a use tax on those who used tax-exempt property owned by the United States.

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[12] The Federal Government would otherwise have had the power—enjoyed by no other employer—of giving its employees housing on which no property tax is paid by them either directly or indirectly as rent paid to a landlord who himself paid a property tax.

[13] The Government has expressly abandoned its claim, made below, that the tax treats federal employees who live in federally owned houses differently from state employees who lived in state-owned houses.

The tax was measured by the value of the property. With respect to nonexempt property, a similar tax was imposed on the owner and none on the user. In answering an argument that the tax discriminated against those dealing with the Federal Government, the Court said:

> "As suggested before the legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property. Those using exempt property are required to pay no greater tax than that placed on private owners *or passed on by them to their business lessees.*" *Id.*, at 473–474. (Emphasis added.)

Similarly, here the State of California imposes a property tax on owners of nonexempt property which is "passed on by them to their . . . lessees." Consequently, the appellants who rent from the Forest Service are no worse off under California tax laws than those who work for private employers and rent houses in the private sector.

The Government argues nonetheless that the appellants are required to occupy the houses owned by the Forest Service not for their own personal benefit but for the sole benefit of the Forest Service and that "[t]here is accordingly no constitutionally permissible way to isolate any 'personal residence' portion of these possessory interests that could be deemed to be unrelated to the official duties of these Forest Service employees." Brief for United States 18.[14] The argument is at odds with the Government's own concessions during this lawsuit, with its treatment of its employees apart from this lawsuit, and with common sense. The Government's complaint in this case alleges that the occupancy of the Forest Service houses constitutes part of appellants' "compensation" for services performed—thus conceding that the occupancy is of personal benefit to the employee. At oral argument the Government conceded that a state income tax could be imposed on the employees for the value of the occupancy—thus conceding that its value to the employee is capable of being severed from its value to the Forest Service and of being accurately measured. The Forest Service itself purports to measure the personal benefit of the occupancy to the employee and collects rent in such an amount through deductions from the employee's paycheck. Since virtually everyone in this country pays for housing for himself or herself and family, common sense compels the conclusion that the occupancy of a house provided by an employer for an employee's family is of personal financial benefit to the employee—relieving him of the expense of paying for housing elsewhere.[15] The disadvantages attendant on living in Forest Service housing may affect the amount of the value of the house to the employee, but it is unquestionably of some value to him. Here both appellees have sought to take account of these disadvantages and to tax the employees only on the portion of the total value of the houses which may be properly attributed to *their* possessory interest. In this respect, the taxes are valid even under *United States* v. *Allegheny County,* 322 U. S. 174 (1944), see n. 10, *supra,* so heavily relied on by the Government. There the Court invalidated a tax on use by a private corporation of Government-owned property because "the State has made no effort to segregate [the corporation's] interest and tax it." *Id.*, at 187. The Court stated, however:

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[14] If it were factually accurate that the use of Forest Service housing is of no personal benefit to appellants, the tax would discriminate against those who work for the Federal Government since California imposes no other tax on its citizens with respect to property in which those citizens have no beneficial personal or business interest. The tax would thus run afoul at least of the Supremacy Clause. *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819); *United States* v. *City of Detroit*, 355 U. S., at 473.

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[15] An attempt by California to impose a use tax on a Forest Service employee for his fire ax—which he used *only* in performing his job—or on a fire tower inhabited by such employee in the daytime and solely in order to perform his job would present a different question. The employee does not put either the ax or the tower to " 'beneficial personal use,' " and it is not part of his " 'profit' " or his " 'salary.' " *United States* v. *City of Detroit, supra,* at 471. See n. 14, *supra.*

> "Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. . . . His personal advantages from the relationship by way of salary, profit or *beneficial personal use* of the property may be taxed as we have held." *Id.*, at 187–188. (Emphasis added.)

This statement ripened into holdings in *United States* v. *City of Detroit, supra,* at 472, and *United States* v. *Township of Muskegon,* 355 U. S. 484 (1958). The only difference between *Township of Muskegon*—where Government-owned property was being used by a private corporation in complying with a Government contract—and this case is that there the property was being used by business for "profit" and here the property is being put to "beneficial personal use." Under the rule of *United States* v. *Allegheny County* and *United States* v. *City of Detroit,* this difference is inconsequential. The two types of interests are equally taxable.

In conclusion, as the Court said in *City of Detroit* v. *Murray Corp.,* 355 U. S., at 495:

> "There was no discrimination against the Federal Government, its property or those with whom it does business. There was no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property. Cf. *M'Culloch* v. *Maryland,* 4 Wheat. 316. In such circumstances the Congress is the proper agency, as we pointed out in *United States* v. *City of Detroit,* to make the difficult policy decisions necessarily involved in determining whether and to what extent pri-

vate parties who do business with the Government should be given immunity from states taxes."

*Affirmed.*

MR. JUSTICE STEVENS, dissenting.

The application of the California possessory interest tax to federal employees' use of real estate located in a national forest is significantly different from other forms of state taxation and, in my opinion, creates the kind of potential for friction between two sovereigns that the doctrine of constitutional immunity was intended to avoid.

## I

If a State were to tax the income of federal employees without imposing a like tax on others, the tax would be plainly unconstitutional. Cf. *M'Culloch* v. *Maryland,* 4 Wheat. 316. On the other hand, if the State taxes the income of all its residents equally, federal employees must pay the tax. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466. This case involves a tax more like the former than the latter and, in my opinion, is invalid.

There are two alternatives between the two extremes just posited. Instead of just taxing federal employees, the State might impose a special tax on both state and federal employees but no one else; or, making the tax base somewhat broader, the State might impose a special tax on employees of all tax-exempt entities, including private organizations. Arguably, in the latter situation, the tax would affect enough voters in the State to provide the type of political safeguard envisioned in *M'Culloch* and thereby protect federal employees from the risk of disparate treatment. In the former situation, however, that protection might be illusory because the sovereign imposing the tax could adjust the compensation of its own employees to avoid any special tax burden on them and thereby cause the tax to have a significant impact on federal employees and no one else. Under the rationale of *M'Culloch,* the Supremacy Clause protects federal employees, as well as federal instrumentalities, from that kind of potential discrimination.

### A

The California possessory interest tax discriminates against the individual appellants as compared with persons who rent private, nonexempt property. The Federal Government has adopted a policy of charging its employees a rent equal to the fair rental value of their residences as determined by the prevailing rental value of comparable residences in the vicinity of the national forest.[1] A federal employee residing in a Forest Service residence and a private tenant residing in a comparable home both pay the same rent. But the federal employee also pays a possessory interest tax while the private tenant does not pay that tax or any other real estate tax.

The amount of the possessory interest tax paid by the federal employee is not determined by his rent. Whether the rent collected by the Forest Service is over, under, or equal to the fair rental value of the premises, the employee's tax is the same.[2] For the tax is measured by the value of his possessory interest in the real estate, and, under the valuation systems employed by the counties, that value is the same regardless of whether the Federal Government elects to subsidize, in whole or in part, its employee's use of the property. The analogy, *ante,* at 466, to a state income tax on compensation provided by means of permission to use property for less than its fair rental value is therefore inapplicable.[3]

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[1] The court below endorsed the undisputed finding of the trial court that this policy was in effect at the time this litigation arose, 50 Cal. App. 3d 633, 637, 123 Cal. Rptr. 548, 550 (1975).

[2] It is true, as the majority notes, *ante,* at 466, that appellee counties have sought to tax the individual appellants only on that portion of the total value of the residences which may be properly attributed to their personal, non-job-related, possessory interest. This fact affects the *amount* of the tax but not its discriminatory character.

The discrimination between the federal employee and the private tenant is not eliminated by the fact that the *owner* of the private residence pays a real estate tax which the Federal Government does not. The private owner's tax obligation is one of the factors that determines the fair rental value of his property—and, no doubt, the fair rental value of Government-owned property as well—but it is not correct to say that the owner's tax is paid by the tenant. When the private and the public tenant are both charged the same rent, a special tax on the latter is surely not justified by the Federal Government's tax exemption.[4] To the extent that the exemption has significance, it provides a limit on the State's taxing power; it cannot provide an affirmative justification for an otherwise invalid tax.[5] In short, federal employees like these appellants are required to pay a discriminatory tax; *Graves* v. *New York ex rel. O'Keefe, supra,* does not control this case.

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[3] Although the Federal Government's complaint alleged that the occupancy of the residences constituted part of appellants' "compensation," the proof established that the Forest Service charged its employees the fair rental value of similar houses in the private sector. The state courts so found, see n. 1, *supra*.

[4] The fact that the Federal Government receives higher net rents than those received by private landlords is a consequence of its tax-exempt status which avoids one of the burdens of ownership of property regardless of how the Government elects to use its property.

[5] The majority states that the only burden the tax imposes on the Forest Service is economic—causing it to reimburse its employees for "the taxes legally owed by them" or, failing reimbursement, removing an advantage otherwise enjoyed by the Government in the employment market, *ante*, at 464. But an attempt to reimburse all federal employees for taxes legally owed would entail a great deal more than the economic burden represented by the value of the taxes. Appellees Fresno and Tuolumne Counties have different methods of computing the value of the possessory interest, *ante*, at 456 n. 4. Once these counties determine the assessed valuation of the possessory interests, presumably they apply different tax rates to determine the actual dollar value of each appellant's tax. The Forest Service owns residences in many coun-

## B

This California tax does not even apply to all users of tax-exempt property. By its terms the possessory interest tax applies only to "publicly owned real property."[6] It does not, for example, apply to the residential use of real estate owned by private hospitals, schools, or religious organizations, all of which are exempt from taxation under the laws of California.[7] In fact it appears that the only individuals who are similar to the federal employees with respect to the possessory interest tax are state employees living in state-owned houses. But since the State of California, and its political subdivisions, can fix their rent, the State has the practical power to adjust the economic burden of the possessory interest tax assessed against its own tenant employees. Potentially, therefore, the tax may have a practical effect on the Federal Government and its employees which is different

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ties throughout the United States. The administrative burden of determining the correct amount of tax owed on each unique residence operating under myriad payment systems and due dates would be immense. In my judgment, this administrative cost provides another reason why this exercise of a State's taxing power runs afoul of the Supremacy Clause. Moreover, I do not believe the State's power can be exercised in a manner which requires the Federal Government to surrender its own tax exemption in order to protect its employees from a discriminatory tax. I do not understand the relevance of the Federal Government's so-called advantage in the employment market.

[6] Title 18 Cal. Adm. Code § 21 (b) (1971), quoted *ante,* at 455 n. 3.

[7] See *Cedars of Lebanon Hospital* v. *County of Los Angeles,* 35 Cal. 2d 729, 221 P. 2d 31 (1950) (private hospital); *Church Divinity School* v. *County of Alameda,* 152 Cal. App. 2d 496, 314 P. 2d 209 (1957) (college-level private school); *Serra Retreat* v. *County of Los Angeles,* 35 Cal. 2d 755, 221 P. 2d 59 (1950), and *Saint Germain Foundation* v. *County of Siskiyou,* 212 Cal. App. 2d 911, 28 Cal. Rptr. 393 (1963) (religious organizations).

from its effect on the owners or users of any other tax-exempt property in the State.

Thus, whether the federal tenants are compared with persons occupying property owned by taxpayers or with persons occupying other tax-exempt property, they are vulnerable to a discriminatory tax.

## II

Whereas the California tax scheme creates a discrimination between users of property that would not otherwise exist, the Michigan taxes upheld in *United States* v. *City of Detroit*, 355 U. S. 466; *United States* v. *Township of Muskegon*, 355 U. S. 484; and *City of Detroit* v. *Murray Corp. of America*, 355 U. S. 489, were designed to eliminate disparity in the tax treatment of different users of similar property. The Michigan taxes were designed to equalize the tax burden of competing commercial enterprises whether they used tax-exempt or taxable property in the conduct of their businesses.[8]

The Michigan tax at issue in the first two cases applied to every private party using any type of exempt property in the State. The tax base included not only property owned by the Federal and State Governments, but also all privately owned exempt real estate. In the first case the Court expressly relied on the undisputed evidence that lessees of other exempt property were being taxed as foreclosing any claim of discrimination against those using federal property. 355 U. S., at 474. In the third case, the tax was a general personal property tax which was applied indiscriminately throughout the State, 355 U. S., at 494.

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[8] "The United States asks this Court to strike down as unconstitutional a tax statute of the State of Michigan as applied to a lessee of government property. In general terms this statute, Public Act 189 of 1953, provides that when tax-exempt real property is used by a private party in a business conducted for profit the private party is subject to taxation to the same extent as though he owned the property." *United States* v. *City of Detroit*, 355 U. S., at 467.

The critical importance of the absence of any discrimination in the Michigan scheme, and its sharp contrast with the California scheme challenged in this case, are both apparent from this passage:

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. *M'Culloch* v. *Maryland,* 4 Wheat. 316. But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities. The class defined is not an arbitrary or invidiously discriminatory one. As suggested before the legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property. Those using exempt property are required to pay no greater tax than that placed on private owners or passed on by them to their business lessees. In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility." *United States* v. *City of Detroit, supra,* at 473–474 (footnote omitted).

The case now before us does not involve any question of economic preference between competing private parties. Indeed, unlike the Michigan cases in which the Court identified as "vital" the fact that the taxpayers were engaged in commercial activities,[9] this case only involves an application of the

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[9] "The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own

California tax to the use of Government property in the performance of a traditional governmental function: managing the national forests. The Government requires the taxpayer-forester to occupy the property. The Michigan opinions do not hold or imply that required Government service is comparable to private commercial activity. Indeed, as I read those opinions, they direct us to focus on the question whether there is equality or inequality between *users* of public and private property. The Michigan tax was valid because there was no discrimination between users; the California tax is invalid because it creates such inequality.

## III

This case is not squarely controlled by *M'Culloch* v. *Maryland,* because this tax applies to the use of state as well as federal property.[10] Apparently, employees of state

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commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms. But here Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them." *United States* v. *Township of Muskegon,* 355 U. S., at 486.

The Michigan tax at issue in the first two cases applied only to use in connection with a business conducted for profit, *United States* v. *City of Detroit,* 355 U. S., at 467-468, n. 1.

See also *City of Detroit* v. *Murray Corp. of America,* 355 U. S., at 493, where there is emphasis on the fact that the taxpayer used the Federal Government's personal property "in the course of its own business."

[10] In *M'Culloch* v. *Maryland,* the State taxed notes issued by the Bank of the United States differently from any other property. But if the state tax in that case had applied to a national bank and also to a group of state-operated institutions which the State could subsidize in order to eliminate the economic burden of the tax—but to no other taxpayers—it surely would have been equally invalid. In such a situation, as in *M'Culloch* itself and as in this case, the federal instrumentality

parks are treated like employees of national forests. If this is sufficient to save the tax, I would suppose the State could tax a soldier's use of Army barracks if the State also taxed its police officers whenever they resided in state quarters. Such a tax, I submit, would be patently invalid for reasons which also apply to this case. It would have an impact on federal servants different from its impact on most constituents of the taxing sovereign; and it would create a significant potential conflict between the interests of two sovereigns in the same territory.

As explained by Mr. Justice Frankfurter in his separate opinion in *City of Detroit* v. *Murray Corp. of America,* 355 U. S., at 503-504:

> "A principle with the uninterrupted historic longevity attributable to the immunity of government property from state taxation has a momentum of authority that reflects, if not a detailed exposition of considerations of policy demanded by our federal system, certainly a deep instinct that there are such considerations, and that the distinction between a tax on government property and a tax on a third person for the privilege of using such property is not an 'empty formalism.' The distinction embodies a considered judgment as to the minimum safeguard necessary for the National Government to carry on its essential functions without hindrance from the exercise of power by another sovereign within the same territory. That in a particular case there may in fact be no conflict in the exercise of the two governmental powers is not to the point. It is in avoiding the potentialities of friction and furthering the smooth operation of complicated governmental machinery that the constitutional doctrine of immunity finds its explanation and justification."

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would have been vulnerable to discriminatory treatment by the State different from that accorded to the State's own constituents.

The specific distinction which Mr. Justice Frankfurter draws in that paragraph appears to support the validity of the California tax on the use by "a third person" of real estate in a national forest. I do not, of course, know whether Mr. Justice Frankfurter would have regarded a Government employee, like the appellants in this case, as the kind of "third person" whose use of federal property in the performance of a traditional governmental function would be taxed. I am convinced, however, that the principle which he articulated supports the immunity claim of these appellants. I therefore respectfully dissent.

# BRUNSWICK CORP. v. PUEBLO BOWL-O-MAT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-904. Argued November 3, 1976—Decided January 25, 1977

Respondents, bowling centers in three distinct markets, brought this antitrust action against petitioner, one of the two largest bowling equipment manufacturers and the largest operator of bowling centers, claiming that petitioner's acquisitions of competing bowling centers that had defaulted in payments for bowling equipment that they had purchased from petitioner might substantially lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act. Respondents sought treble damages pursuant to § 4 of the Act as well as injunctive and other relief. At trial they sought to prove that petitioner because of its size had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased. The jury returned a verdict for damages in favor of respondents, which the District Court trebled in accordance with § 4. The Court of Appeals, while endorsing the legal theories upon which respondents' claim was based, reversed the case and remanded for further proceedings because of errors in the trial court's instructions to the jury. The court concluded that a properly instructed jury could have found that a "giant" like petitioner entering a market of "pygmies" might lessen horizontal retail competition. The court also concluded that there was sufficient evidence to permit a jury to find that but for petitioner's actions, the acquired centers would have gone out of business. The court held that if a jury were to make such findings, respondents would be entitled to damages for threefold the income they would have earned. Petitioner's petition for certiorari challenged the theory that the Court of Appeals had approved for awarding damages. *Held:*

1. For plaintiffs in an antitrust action to recover treble damages on account of § 7 violations, they must prove more than that they suffered injury which was causally linked to an illegal presence in the market; they must prove injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury must reflect the anticompetitive effect

of either the violation or of anticompetitive acts made possible by the violation. Pp. 484–489.

(a) Section 4 is essentially a remedial provision, and to recover damages respondents must prove more than that petitioner violated § 7. Pp. 485–487.

(b) Congress has condemned mergers only when they may produce anticompetitive effects; yet under the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations that the merger caused are actionable regardless of whether the dislocations have anything to do with the reason the merger was condemned. Here if the acquisitions were unlawful it is because they brought a "deep pocket" parent into a market of "pygmies," but respondents' injury is unrelated to the size of either the acquiring company or its competitors; it would have suffered the identical loss but without any recourse had the acquired centers secured refinancing or had they been bought by a "shallow pocket" parent. Pp. 487–488.

2. Petitioner is entitled under Fed. Rule Civ. Proc. 50 (b) to judgment on the damages claim notwithstanding the verdict, since respondents' case was based solely on their novel theory, rejected herein, of damages ascribable to profits they would have received had the acquired centers been closed, and since respondents have not shown any reason to require a new trial. Pp. 489–490.

3. Respondents remain free on remand to seek equitable relief. P. 491.

523 F. 2d 262, vacated and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

*Bernard G. Segal* argued the cause for petitioner. With him on the briefs were *Ira P. Tiger, Joseph A. Tate, Miles G. Seeley,* and *Thomas B. McNeill.*

*Malcolm A. Hoffmann* argued the cause for respondents. With him on the brief was *Edward A. Woolley.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises important questions concerning the interrelationship of the antimerger and private damages action provisions of the Clayton Antitrust Act.

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**John L. Endicott* and *John J. Swenson* filed a brief for Purex Corp. as *amicus curiae.*

## I

Petitioner is one of the two largest manufacturers of bowling equipment in the United States. Respondents are three of the 10 bowling centers owned by Treadway Companies, Inc. Since 1965, petitioner has acquired and operated a large number of bowling centers, including six in the markets in which respondents operate. Respondents instituted this action contending that these acquisitions violated various provisions of the antitrust laws.

In the late 1950's, the bowling industry expanded rapidly, and petitioner's sales of lanes, automatic pinsetters, and ancillary equipment rose accordingly.[1] Since this equipment requires a major capital expenditure—$12,600 for each lane and pinsetter, App. A1576—most of petitioner's sales were for secured credit.

In the early 1960's, the bowling industry went into a sharp decline. Petitioner's sales quickly dropped to preboom levels. Moreover, petitioner experienced great difficulty in collecting money owed it; by the end of 1964 over $100,000,000, or more than 25%, of petitioner's accounts were more than 90 days delinquent. *Id.*, at A1884. Repossessions rose dramatically, but attempts to sell or lease the repossessed equipment met with only limited success.[2] Because petitioner had borrowed close to $250,000,000 to finance its credit sales, *id.*, at A1900, it was, as the Court of Appeals concluded, "in serious financial difficulty." *NBO Industries Treadway Cos., Inc.* v. *Brunswick Corp.*, 523 F. 2d 262, 267 (CA3 1975).

To meet this difficulty, petitioner began acquiring and operating defaulting bowling centers when their equipment could not be resold and a positive cash flow could be expected from operating the centers. During the seven years preceding the trial in this case, petitioner acquired 222 centers, 54 of which it either disposed of or closed. *Ibid.* These acquisitions made petitioner by far the largest operator of bowling centers, with over five times as many centers as its next largest competitor. *Ibid.* Petitioner's net worth in 1965 was more than eight times greater, and its gross revenue more than seven times greater, than the total for the 11 next largest bowling chains. App. A1675. Nevertheless, petitioner controlled only 2% of the bowling centers in the United States. *Id.*, at A1096.

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[1] Sales of automatic pinsetters, for example, went from 1,890 in 1956 to 16,288 in 1961. App. A1866.

[2] Repossessions of pinsetters increased from 300 in 1961 to 5,996 in 1965. *Ibid.* In 1963, petitioner resold over two-thirds of the pinsetters repossessed; more typically, only one-third were resold, and in 1965, less than one-quarter were resold. *Id.*, at A1879.

At issue here are acquisitions by petitioner in the three markets in which respondents are located: Pueblo, Colo., Poughkeepsie, N. Y., and Paramus, N. J. In 1965, petitioner acquired one defaulting center in Pueblo, one in Poughkeepsie, and two in the Paramus area. In 1969, petitioner acquired a third defaulting center in the Paramus market, and in 1970 petitioner acquired a fourth. Petitioner closed its Poughkeepsie center in 1969 after three years of unsuccessful operation; the Paramus center acquired in 1970 also proved unsuccessful, and in March 1973 petitioner gave notice that it would cease operating the center when its lease expired. The other four centers were operational at the time of trial.

Respondents initiated this action in June 1966, alleging, *inter alia*, that these acquisitions might substantially lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act, 15 U. S. C. § 18.[3] Respondents sought damages, pursuant to § 4 of the Act, 15 U. S. C. § 15, for three times "the reasonably expectable profits to be made [by respondents] from the operation of their bowling centers." App. A24. Respondents also sought a divestiture order, an injunction against future acquisitions, and such "other further and different relief" as might be appropriate under § 16 of the Act, 15 U. S. C. § 26. App. A27.

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[3] The complaint contained two additional counts. Count one alleged that petitioner had violated § 1 of the Sherman Act, 15 U. S. C. § 1, by fixing resale prices for bowling supplies sold by petitioner to respondents. This count was abandoned prior to trial. Count two alleged that by virtue of the acquisitions and other acts, petitioner was guilty of monop-

Trial was held in the spring of 1973, following an initial mistrial due to a hung jury. To establish a § 7 violation, respondents sought to prove that because of its size, petitioner had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased. At respondents' request, the jury was instructed in accord with respondents' theory as to the nature of the violation and the basis for damages. The jury returned a verdict in favor of respondents in the amount of $2,358,030, which represented the minimum estimate by respondents of the additional income they would have realized had the acquired centers been closed. *Id.*, at A1737. As required by law, the District Court trebled the damages.[4] It also awarded respondents costs and attorneys'

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olization or an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The jury found for petitioner on this count, and respondents did not appeal.

The complaint also named as plaintiffs National Bowl-O-Mat, the predecessor to Treadway Companies, and the seven other bowling center subsidiaries of Treadway. These plaintiffs were unsuccessful on all counts, however, and they did not appeal the judgments entered against them.

[4] Judgment ultimately was entered for $6,575,040, which is $499,050 less than three times the jury's damages award, after respondent Pueblo Bowl-O-Mat consented to a remittitur which the District Court proposed as an alternative to a retrial on damages. *Treadway Cos.* v. *Brunswick Corp.*, 364 F. Supp. 316, 324–326 (NJ 1973). The remittitur was deemed necessary because the jury apparently awarded damages to that respond-

fees totaling $446,977.32, and, sitting as a court of equity, it ordered petitioner to divest itself of the centers involved here, *Treadway Cos.* v. *Brunswick Corp.*, 389 F. Supp. 996 (NJ 1974). Petitioner appealed.[5]

The Court of Appeals, while endorsing the legal theories upon which respondents' claim was based, reversed the judgment and remanded the case for further proceedings. *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, *supra*. The court found that a properly instructed jury could have concluded that petitioner was a "giant" whose entry into a "market of pygmies" might lessen horizontal retail competition, because such a "giant"

> "has greater ease of entry into the market, can accomplish cost-savings by investing in new equipment, can resort to low or below cost sales to sustain itself against competition for a longer period, and can obtain more favorable credit terms." 523 F. 2d, at 268.

The court also found that there was sufficient evidence to permit a jury to conclude that but for petitioner's actions, the acquired centers would have gone out of business. *Id.*,

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ent in accord with its minimum claim dating back to 1963, when the alleged § 2 violation began, rather than back to 1965, when the alleged § 7 violation began. The District Court thought that the jury might have been confused by the instruction to use the same methods for calculating damages under the two sections. *Ibid.*

[5] Petitioner's appeal and respondents' cross-appeal with respect to the amount of the attorneys' fee award initially were dismissed by the Court of Appeals for want of jurisdiction because the District Court had neither disposed of respondents' equitable claim nor certified the judgment entered on the legal claims pursuant to Fed. Rule Civ. Proc. 54 (b). *Treadway Cos.* v. *Brunswick Corp.*, 500 F. 2d 1400 (CA3 1974) (order reported); App. A1563–A1566 (*per curiam* opinion reprinted). The District Court then certified the previously entered judgment, and the parties reappealed. While the appeals were pending, the District Court granted equitable relief, and the appeal from that judgment was consolidated with the pending appeals.

at 273, 275–277. And the court held that if a jury were to make such findings, respondents would be entitled to damages for threefold the income they would have earned. After reviewing the instructions on these issues, however, the court decided that the jury had not been properly charged and that therefore a new trial was required. *Id.*, at 275–277.[6] It also decided that since "an essential predicate" for the District Court's grant of equitable relief was the jury verdict on the § 7 claim, the equitable decree should be vacated as well. *Id.*, at 277–278. And it concluded that in any event equitable relief "should be restricted to preventing those practices by which a deep pocket market entrant harms competition . . . . [D]ivestiture was simply inappropriate." *Id.*, at 279.

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[6] With respect to the instruction on the issue of liability, the court concluded that since petitioner's acquisitions "did not increase concentration," the District Court had erred by focusing on the size of the market shares acquired by petitioner rather than on "indicators of qualitative substantiality" such as the "relative financial strength of Brunswick, Treadway, and other competitors," or "any retail market advantage" enjoyed by petitioner because of its status as financier and manufacturer. *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, 523 F. 2d, at 274–275 (CA3 1975). With respect to the instruction on damages, the Court of Appeals concluded that the District Court had failed to direct the jury to decide whether petitioner's actions were responsible for keeping the acquired centers in business before considering how much additional income respondents would have earned if the acquired centers had been closed. *Id.*, at 276–277.

The Court of Appeals also held, *id.*, at 275, that in instructing the jury on the statutory requirement that the acquired company be "engaged . . . in commerce," the District Court had not anticipated this Court's decision in *United States* v. *American Bldg. Maint. Industries*, 422 U. S. 271 (1975), which read the "in commerce" requirement more restrictively than had the leading decision of the Third Circuit, *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, cert. denied, 346 U. S. 901 (1953). Indeed, the court indicated that there might not be sufficient evidence in the record to satisfy the "in commerce" test. 523 F. 2d, at 271. The court concluded, however, that given the change in the law, it would be "unjust" to find the evidence insufficient and thereby deny plaintiffs an opportunity to meet the new test on retrial.

Both sides petitioned this Court for writs of certiorari. Brunswick's petition challenged the theory the Court of Appeals had approved for awarding damages; the plaintiffs' petition challenged the Court of Appeals' conclusions with respect to the jury instructions and the appropriateness of a divestiture order.[7] We granted Brunswick's petition.[8] 424 U. S. 908 (1976).

## II

The issue for decision is a narrow one. Petitioner does not presently contest the Court of Appeals' conclusion that a properly instructed jury could have found the acquisitions unlawful. Nor does petitioner challenge the Court of Appeals' determination that the evidence would support a finding that had petitioner not acquired these centers, they would have gone out of business and respondents' income would have increased. Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares.[9]

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[7] Both petitions also questioned the Court of Appeals' decision to require relitigation of the "in commerce" issue, see n. 6, *supra*. Brunswick maintained it was entitled to a directed verdict on this issue; plaintiffs argued that they had satisfied the new test and that therefore no new trial was required.

[8] The grant of certiorari excluded the question Brunswick sought to present concerning the sufficiency of the evidence that the acquired companies were engaged "in commerce," see nn. 6, 7, *supra*.

No action has been taken with respect to respondents' petition.

[9] Petitioner raises this issue directly through the first question presented, and indirectly through the second, which asks:

"Does not the 'failing company' principle require dismissal of a treble-damage action based on alleged violations of Section 7 of the Clayton Act where the plaintiffs' entire damage theory is based on the premise that the 'acquired' businesses would have failed and disappeared from the

To answer that question it is necessary to examine the antimerger and treble-damages provisions of the Clayton Act. Section 7 of the Act proscribes mergers whose effect "*may be* substantially to lessen competition, or *to tend to* create a monopoly." (Emphasis added.) It is, as we have observed many times, a prophylactic measure, intended "primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil . . . ." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 597 (1957). See also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 317–318 (1962); *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 362–363 (1963); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 170–171 (1964); *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 277 (1966); *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 577–578 (1967); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 201 (1974).

Section 4, in contrast, is in essence a remedial provision. It provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. *Perma Life Mufflers* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968); *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495, 502 (1969); *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. 100, 130 (1969); *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262 (1972). It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a

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market had the defendant not kept them alive by making the challenged 'acquisitions?' " Pet. for Cert. 3.

In light of our holding, we have no occasion to consider the applicability of the failing-company defense to the conglomerate-like acquisitions involved here.

multiple of the injury actually proved, is designed primarily as a remedy.[10]

Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated § 7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not committed those acts. The Court of Appeals agreed, holding compensable any loss "causally linked" to "the mere presence of the violator in the market." 523 F. 2d, at 272–273. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.

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[10] Treble-damages antitrust actions were first authorized by § 7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals," especially consumers. 21 Cong. Rec. 1767–1768 (1890) (remarks of Sen. George); see *id.*, at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146–3149. Treble damages were provided in part for punitive purposes, *id.*, at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act. *Id.*, at 2456 (Sen. Sherman).

When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. H. R. Rep. No. 627, 63d Cong., 2d Sess., 14 (1914). The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); see, *e. g.*, *id.*, at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414–9417, 9466–9467, 9487–9495. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble-damages suits as an important means of enforcing the law. *Id.*, at 16274–16275 (Rep. Webb), 16317–16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, *e. g.*, *id.*, at 15818–15821 (Sen. Reed), 16042–16046 (Sen. Norris).

Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.[11]

Both of these consequences are well illustrated by the facts of this case. If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury—the loss of income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents, as the Court of Appeals itself acknowledged, 523 F. 2d, at 279.[12] Thus, respondents' injury was not of "the type that the statute was intended to forestall," *Wyandotte Co.* v. *United States,* 389 U. S. 191, 202 (1967).[13]

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[11] See Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127, 1130–1136 (1976); Symposium, Private Enforcement of the Antimerger Laws, 31 Record of N. Y. C. B. A., 239, 260–261 (1976).

[12] Conversely, had petitioner acquired thriving centers—acquisitions at least as violative of § 7 as the instant acquisitions—respondents would not have lost any income that they otherwise would have received.

But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of *competition,* not *competitors,*" *Brown Shoe Co.* v. *United States,* 370 U. S., at 320. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Of course, Congress is free, if it desires, to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of these consequences, "we should insist upon a clear expression of a congressional purpose," *Hawaii* v. *Standard Oil Co.,* 405 U. S., at 264, before attributing such an intent to Congress. We can find no such expression in either the language or the legislative history of § 4. To the contrary, it is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes "injury" within the meaning of § 4. And it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.

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[13] For instances in which plaintiffs unsuccessfully sought damages for injuries unrelated to the reason the merger was prohibited, see *Reibert* v. *Atlantic Richfield Co.,* 471 F. 2d 727 (CA10), cert. denied, 411 U. S. 938 (1973); *Peterson* v. *Borden Co.,* 50 F. 2d 644 (CA7 1931); *Kirihara* v. *Bendix Corp.,* 306 F. Supp. 72 (Haw. 1969); *Goldsmith* v. *St. Louis-San Francisco R. Co.,* 201 F. Supp. 867 (WDNC 1962).

We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research,* 395 U. S., at 125.[14]

## III

We come, then, to the question of appropriate disposition of this case. At the very least, petitioner is entitled to a new trial, not only because of the instructional errors noted by the Court of Appeals that are not at issue here, see n. 6, *supra,* but also because the District Court's instruction as to the basis for damages was inconsistent with our holding as outlined above. Our review of the record, however, persuades us that a new trial on the damages claim is unwarranted. Respondents based their case solely on their novel damages theory which we have rejected. While they produced some conclusory testimony suggesting that in operating the acquired centers petitioner had abused its deep pocket by engaging in anticompetitive conduct,[15] they made no attempt to prove that they had lost any income as a result of such predation.[16] Rather, their entire proof of damages was based on their claim to profits that would have been earned had the acquired centers closed. Since respondents did not prove any cognizable damages and have not offered any justification for allowing respondents, after two trials and over 10 years of litigation, yet a third opportunity to do so, it follows that, petitioner is entitled, in accord with its motion made pursuant to Rule 50 (b), to judgment on the damages claim notwithstanding the verdict. *Neely* v. *Eby Constr. Co.*, 386 U. S. 317, 326–330 (1967); *United States* v. *Generes*, 405 U. S. 93, 106–107 (1972).

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[14] See generally *GAF Corp.* v. *Circle Floor Co.,* 463 F. 2d 752 (CA2 1972), cert. dismissed, 413 U. S. 901 (1973); Comment, Section 7 of the Clayton Act: The Private Plaintiff's Remedies, 7 B. C. Ind. & Comm. L. Rev. 333 (1966); Comment, Treble Damage Actions for Violations of Section 7 of the Clayton Act, 38 U. Chi. L. Rev. 404 (1971).

This does not necessarily mean, as the Court of Appeals feared, 523 F. 2d, at 272, that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished. See, *e. g., Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F. 2d 674 (CA9 1976); *Metric Hosiery Co.* v. *Spartans Industries, Inc.,* 50 F. R. D. 50 (SDNY 1970); Klingsberg, Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act, 16 Antitrust Bull. 351, 364 (1971).

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[15] Respondents' testimony concerned price reductions at three centers, App. A170, A420, A431; unjustified capital expenses at three centers, *id.*, at A503–A506, A829–A830; and extravagant "give-aways," *id.*, at A169–A170, A222–A223, A413–A414, A569. This testimony is rather unimpressive when viewed against both petitioner's contemporaneous business records which reveal that it did not lower prices when it took over the centers, Defendant's Exhibits D–32, D–33, D–36, D–38, and respondents' own exhibits, which demonstrate that petitioner made a profit at two centers, App. A1700, generated a positive cash flow at three others, *id.*, at A1717, A1720, and closed the two centers that were unsuccessful, *id.*, at A1725, A1733.

[16] One of respondents' witnesses did testify that he knew of one bowling league in Pueblo that had shifted from a respondent to petitioner after petitioner installed faster automatic pinsetters. *Id.*, at 508. Assuming, *arguendo*, that such installations were not cost justified and constituted a form of predation, respondents still made no attempt to quantify the loss.

Respondents' complaint also prayed for equitable relief, and the Court of Appeals held that if respondents established a § 7 violation, they might be entitled to an injunction against "those practices by which a deep pocket market entrant harms competition." 523 F. 2d, at 279. Because petitioner has not contested this holding, respondents remain free, on remand, to seek such a decree.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# OREGON *v.* MATHIASON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

No. 76-201. Decided January 25, 1977

Where respondent in response to a police officer's request voluntarily came to a police station for questioning about a burglary and was immediately informed that he was not under arrest, and at the close of a half-hour interview left the station without hindrance, respondent was not in custody "or otherwise deprived of his freedom of action in any significant way," *Miranda* v. *Arizona*, 384 U. S. 436, 444, so as to require that his confession to the burglary obtained during such interview be suppressed at his state criminal trial because he was not given *Miranda* warnings prior to being questioned.

Certiorari granted; 275 Ore. 1, 549 P. 2d 673, reversed and remanded.

PER CURIAM.

Respondent Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State's case. At trial he moved to suppress the confession as the fruit of questioning by the police not preceded by the warnings required in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Court of Appeals affirmed respondent's conviction, but on his petition for review in the Supreme Court of Oregon that court by a divided vote reversed the conviction. It found that although Mathiason had not been arrested or otherwise formally detained, "the interrogation took place in a 'coercive environment'" of the sort to which *Miranda* was intended to apply. The court conceded that its holding was contrary to decisions in other jurisdictions, and referred in particular to *People* v. *Yukl*, 25 N. Y. 2d 585, 256 N. E. 2d 172 (1969). The State of Oregon has petitioned for certiorari to review the judgment of the Supreme Court of Oregon. We think that court has read *Miranda* too broadly, and we therefore reverse its judgment.

The Supreme Court of Oregon described the factual situation surrounding the confession as follows:

> "An officer of the State Police investigated a theft at a residence near Pendleton. He asked the lady of the house which had been burglarized if she suspected anyone. She replied that the defendant was the only one she could think of. The defendant was a parolee and a 'close associate' of her son. The officer tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call because 'I'd like to discuss something with you.' The next afternoon the defendant did call. The officer asked where it would be convenient to meet. The defendant had no preference; so the officer asked if the defendant could meet him at the state patrol office in about an hour and a half, about 5:00 p. m. The patrol office was about two blocks from defendant's apartment. The building housed several state agencies.
>
> "The officer met defendant in the hallway, shook hands and took him into an office. The defendant was told he was not under arrest. The door was closed. The two sat across a desk. The police radio in another room could be heard. The officer told defendant he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised that the police believed defendant was involved in the burglary and [falsely stated that] defendant's fingerprints were found at the scene. The defendant sat for a few minutes and then said he had taken the property. This occurred within five minutes after defendant had come to the office. The

> officer then advised defendant of his *Miranda* rights and took a taped confession.
>
> "At the end of the taped conversation the officer told defendant he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p. m. when the defendant left the office.
>
> "The officer gave all the testimony relevant to this issue. The defendant did not take the stand either at the hearing on the motion to suppress or at the trial." 275 Ore. 1, 3-4, 549 P. 2d 673, 674 (1976).

The Supreme Court of Oregon reasoned from these facts that:

> "We hold the interrogation took place in a 'coercive environment.' The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed the defendant he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and the defendant was a parolee under supervision. We are of the opinion that this evidence is not overcome by the evidence that the defendant came to the office in response to a request and was told he was not under arrest." *Id.,* at 5, 549 P. 2d, at 675.

Our decision in *Miranda* set forth rules of police procedure applicable to "custodial interrogation." "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S., at 444. Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense, *Mathis* v. *United States,* 391 U. S. 1 (1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases, *Orozco* v. *Texas,* 394 U. S. 324 (1969).

In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.

The petition for certiorari is granted, the judgment of the Oregon Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*So ordered.*

MR. JUSTICE BRENNAN would grant the writ but dissents from the summary disposition and would set the case for oral argument.

MR. JUSTICE MARSHALL, dissenting.

The respondent in this case was interrogated behind closed doors at police headquarters in connection with a burglary investigation. He had been named by the victim of the burglary as a suspect, and was told by the police that they believed he was involved. He was falsely informed that his fingerprints had been found at the scene, and in effect was advised that by cooperating with the police he could help himself. Not until after he had confessed was he given the warnings set forth in *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

The Court today holds that for constitutional purposes all this is irrelevant because respondent had not " 'been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Ante,* at 494, quoting *Miranda* v. *Arizona, supra,* at 444. I do not believe that such a determination is possible on the record before us. It is true that respondent was not formally placed under arrest, but surely formalities alone cannot control. At the very least, if respondent entertained an objectively reasonable belief that he was not free to leave during the questioning, then he was "deprived of his freedom of action in a significant way."[1]

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[1] See, *e. g., United States* v. *Hall,* 421 F. 2d 540, 544-545 (CA2 1969)

Plainly the respondent could have so believed, after being told by the police that they thought he was involved in a burglary and that his fingerprints had been found at the scene. Yet the majority is content to note that "there is no indication that . . . respondent's freedom to depart was restricted in any way," *ante,* at 495, as if a silent record (and no state-court findings) means that the State has sustained its burden, see *Lego* v. *Twomey,* 404 U. S. 477, 489 (1972), of demonstrating that respondent received his constitutional due.[2]

More fundamentally, however, I cannot agree with the Court's conclusion that if respondent were not in custody no warnings were required. I recognize that *Miranda* is limited to custodial interrogations, but that is because, as we noted last Term, the facts in the *Miranda* cases raised only this "narrow issue." *Beckwith* v. *United States,* 425 U. S. 341, 345 (1976). The rationale of *Miranda,* however, is not so easily cabined.

*Miranda* requires warnings to "combat" a situation in which there are "inherently compelling pressures which work to undermine the individual's will to resist and to compel

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(Friendly, J.); *Lowe* v. *United States,* 407 F. 2d 1391 (CA9 1969); *People* v. *Arnold,* 66 Cal. 2d 438, 426 P. 2d 515 (1967); *People* v. *Rodney P.,* 21 N. Y. 2d 1, 233 N. E. 2d 255 (1967). See also cases collected in Annot., 31 A. L. R. 3d 565, 581–583 (1970 and Supp. 1976).

It has been noted that as a logical matter, a person who honestly but unreasonably believes he is in custody is subject to the same coercive pressures as one whose belief is reasonable; this suggests that such persons also are entitled to warnings. See, *e. g.,* LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 39, 105 (1968); Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?, 25 S. C. L. Rev. 699, 711–714 (1974).

[2] The Court's action is particularly inappropriate because the record of this case has not been transmitted to us, and thus our knowledge of the facts is limited to the information contained in the petition and in the opinions of the state courts.

him to speak where he would not otherwise do so freely." 384 U. S., at 467. It is of course true, as the Court notes, that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it." *Ante,* at 495. But it does not follow that because police "are not required to administer *Miranda* warnings to everyone whom they question," *ibid.,* that they need not administer warnings to *anyone,* unless the factual setting of the *Miranda* cases is replicated. Rather, faithfulness to *Miranda* requires us to distinguish situations that resemble the "coercive aspects" of custodial interrogation from those that more nearly resemble "[g]eneral on-the-scene questioning . . . or other general questioning of citizens in the fact-finding process" which *Miranda* states usually can take place without warnings. 384 U. S., at 477.

In my view, even if respondent were not in custody, the coercive elements in the instant case were so pervasive as to require *Miranda*-type warnings.[3] Respondent was interrogated in "privacy" and in "unfamiliar surroundings," factors on which *Miranda* places great stress. *Id.,* at 449–450; see also *Beckwith* v. *United States, supra,* at 346 n. 7. The investigation had focused on respondent. And respondent was subjected to some of the "deceptive stratagems," *Miranda* v. *Arizona, supra,* at 455, which called forth the *Miranda* decision. I therefore agree with the Oregon Supreme Court that to excuse the absence of warnings given these facts is "contrary to the rationale expressed in *Miranda.*" 275 Ore. 1, 5, 549 P. 2d 673, 675 (1976).[4]

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[3] I do not rule out the possibility that lesser warnings would suffice when a suspect is not in custody but is subjected to a highly coercive atmosphere. See, *e. g., Beckwith* v. *United States,* 425 U. S. 341, 348–349 (1976) (MARSHALL, J., concurring in judgment); ALI, Model Code of Pre-Arraignment Procedure § 110.1 (2) (Approved Draft 1975) (suspects interrogated at police station must be advised of their right to leave and right to consult with counsel, relatives, or friends).

[4] See also Graham, What is "Custodial Interrogation?": California's

The privilege against self-incrimination "has always been 'as broad as the mischief against which it seeks to guard.'" *Miranda* v. *Arizona, supra,* at 459–460, quoting *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892). Today's decision means, however, that the Fifth Amendment privilege does not provide full protection against mischiefs equivalent to, but different from, custodial interrogation.[5] See also *Beckwith* v. *United States, supra.* It is therefore important to note that the state courts remain free, in interpreting state constitutions, to guard against the evil clearly identified by this case.[6]

I respectfully dissent.

MR. JUSTICE STEVENS, dissenting.

In my opinion the issues presented by this case are too important to be decided summarily. Of particular impor-

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Anticipatory Application of *Miranda* v. *Arizona,* 14 UCLA L. Rev. 59, 81–82 (1966); Smith, *supra,* n. 1, at 732, 735.

[5] I trust today's decision does not suggest that police officers can circumvent *Miranda* by deliberately postponing the official "arrest" and the giving of *Miranda* warnings until the necessary incriminating statements have been obtained.

[6] See, *e. g., South Dakota* v. *Opperman,* 428 U. S. 364, 384 (1976) (MARSHALL, J., dissenting); *Baxter* v. *Palmigiano,* 425 U. S. 308, 324, 338–339 (1976) (BRENNAN, J., dissenting); *Michigan* v. *Mosley,* 423 U. S. 96, 120–121 (1975) (BRENNAN, J., dissenting); Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L. J. 421 (1974); Wilkes, More on the New Federalism in Criminal Procedure, 63 Ky. L. J. 873 (1975).

In *Opperman,* this Court reversed a decision of the South Dakota Supreme Court holding that routine inventory searches of impounded automobiles, made without probable cause or consent, violated the Fourth Amendment. The case was remanded, like this one, "for further proceedings not inconsistent with [the] opinion." 428 U. S., at 376. On remand, the South Dakota Supreme Court held that such searches violated a nearly identical provision of the State Constitution, and that therefore the seized evidence should have been suppressed. *State* v. *Opperman,* 89 S. D. —, 228 N. W. 2d 152 (1976).

tance is the fact that the respondent was on parole at the time of his interrogation in the police station. This fact lends support to inconsistent conclusions.

On the one hand, the State surely has greater power to question a parolee about his activities than to question someone else. Moreover, as a practical matter, it seems unlikely that a *Miranda* warning would have much effect on a parolee's choice between silence and responding to police interrogation. Arguably, therefore, *Miranda* warnings are entirely inappropriate in the parole context.

On the other hand, a parolee is technically in legal custody continuously until his sentence has been served. Therefore, if a formalistic analysis of the custody question is to determine when the *Miranda* warning is necessary, a parolee should always be warned. Moreover, *Miranda* teaches that even if a suspect is not in custody, warnings are necessary if he is "otherwise deprived of his freedom of action in any significant way." If a parolee being questioned in a police station is not described by that language, today's decision qualifies that part of *Miranda* to some extent. I believe we would have a better understanding of the extent of that qualification, and therefore of the situations in which warnings must be given to a suspect who is not technically in custody, if we had the benefit of full argument and plenary consideration.

I therefore respectfully dissent from the Court's summary disposition.

# STANTON *v.* STANTON

ON APPEAL FROM THE SUPREME COURT OF UTAH

No. 76–512. Decided January 25, 1977

Where the Utah Supreme Court did not comply with this Court's mandate in *Stanton* v. *Stanton*, 421 U. S. 7, that it resolve how Utah was to eliminate discrimination between genders in Utah statute, which establishes 21 as the age of majority for males, and 18 as the age for females, as applied to a parent's obligation of child support, but instead held that the statute was constitutional as applied to females without considering the discrimination, that court's judgment is vacated and the case is again remanded for further proceedings.

552 P. 2d 112, vacated and remanded.

PER CURIAM.

This appeal brings before us for the second time the Utah Supreme Court's construction of Utah Code Ann. § 15–2–1 (1973),[1] which established 21 as the age of majority for males, and 18 as the age for females, as applied to a parent's obligation to support his children. In our first opinion, we held that this distinction between males and females violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Stanton* v. *Stanton*, 421 U. S. 7 (1975) (*Stanton I*).[2] We, of course, did not decide how Utah was to eliminate the discrimination between the genders, and thereby to determine at what age the appellee's duty to support his daughter terminated. Instead, we remanded the case to the Utah court for it to resolve this issue of state law. *Id.*, at 17–18. Our mandate also directed that appellant should receive $437.38 for her costs on appeal to this Court.

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[1] "15–2–1. Period of minority.—The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors obtain their majority by marriage."

[2] After the decision in *Stanton I*, the Utah Legislature amended the statute to read:

"15–2–1. Age of Majority.—The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage. It is further provided that courts in divorce actions may order support to age 21." 1975 Utah Laws, c. 39.

The parties agree that the amendment does not apply to the present controversy.

On the remand, the Utah Supreme Court did not consider the issue presented to it and held, instead, that the age-of-majority statute was constitutional as applied to females without considering the discrimination. That action does not comply with our mandate.

Upon receiving the mandate in *Stanton I,* the Utah Supreme Court remanded the case, without directions, to the District Court of Salt Lake County. That court correctly recognized, pursuant to the parties' stipulation, that the only issue before it was whether, in the absence of a validly worded statutory provision governing child-support age of majority, both sexes should be deemed to attain majority either at age 18 or at age 21. It resolved the issue by holding that, "for purposes of child support, children attain their majority at age 21." Accordingly, it awarded appellant a total of $3,646.18, consisting of $2,700 past due support money, $508.80 interest on the judgment, and the $437.38 costs award from this Court.

On appeal, the Utah Supreme Court, by a 3–2 vote, reversed. 552 P. 2d 112 (1976). Instead of deciding the issue before it, the majority held that the portion of the statute setting the age for females could be viewed in isolation from the portion setting the age for males:

> "Obviously the two provisions of the statute are separable and the Supreme Court of the United States in remanding this matter directed that we decide which age was correct and then legislate a bit on our own and say that the age of majority so chosen for the one sex is also the age of majority for the other sex.

> "The oath we took when chosen as justices of the Supreme Court of Utah forbids us to encroach on the duties and functions of the legislature. However, we need not make any such determination. The age of the male child in this divorce case has never been called into question." *Id.*, at 113.

The court reasoned that the only child before it was a female and, therefore, that the age of 18 provided in § 15–2–1 was constitutional and still applied. As further support for its result, the court declared that the mother had no interest in the equal protection issue and that the parties expected the age discrepancy to apply when the divorce decree was drafted. Finally, as if to erase any remaining doubt about the basis of its decision, the court declared:

> "Regardless of what a judge may think about equality, his thinking cannot change the facts of life. . . .
>
> "To judicially hold that males and females attain their maturity at the same age is to be blind to the biological facts of life." *Id.*, at 114.

The court then undertook to reverse the entire judgment of the District Court, even including the $437.38 derived from this Court's mandate.[3]

This decision, obviously, is inconsistent with our opinion in *Stanton I*. The thrust of *Stanton I*, and therefore the starting point for the Utah court on remand, was that males and females cannot be treated differently for child-support purposes consistently with the Equal Protection Clause of the United States Constitution. Cf. *Craig* v. *Boren*, 429 U. S. 190 (1976). Apparently the Utah Supreme Court did not read our opinion as requiring that the child-support law must be nondiscriminatory to comply with the constitutional standard. That, of course, is a misunderstanding. Accordingly, the judgment of the Utah Supreme Court is vacated, and the case once again is remanded for further proceedings not inconsistent with this opinion.[4]

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[3] Even the appellee recognizes the impropriety of the reversal of the costs factor, and acknowledges that the $437.38 amount is "due and owing and agrees to pay said amount." Appellee's Motion to Dismiss 13.

MR. JUSTICE STEVENS, dissenting in part.

Petitions for rehearing perform the wholesome function of providing the losing litigant with a legitimate forum for adverse comment on an adverse decision. Appellate judges soon learn to discount hyperbole in such petitions.

Judges who are reversed by a higher court sometimes need a similar outlet, particularly when they remain convinced that their original decision was correct. For this reason opinions on remand should occasionally be read with tolerance and understanding, and the question whether this Court's mandate has been violated should be answered by reference to the *judgment* entered by the lower court rather than by reaction to a few unnecessary and unfortunate sentences in a separate opinion joined by only two of six members voting.

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[4] As we did in *Stanton I,* we emphasize that Utah is free to adopt either 18 or 21 as the age of majority for both males and females for child-support purposes. The only constraint on its power to choose is the principle set out in *Stanton I,* and reiterated here, that the two sexes must be treated equally. There are at least two lines of authority that the Utah court legitimately might choose to follow. On the one hand, Utah Code Ann. § 68-3-1 (1968) provides that the common law of England is the rule of decision in the state courts, except where it conflicts with the Constitution or laws of the State or of the United States. Relying on that statute, the Utah court might elect to adopt age 21 as the age of majority in the absence of a valid statute governing child-support cases. On the other hand, the court might take note of the Utah Legislature's response to *Stanton I* in its enactment of the 1975 amendment of § 15-2-1 and read the amendment as an expression by the legislature that the public policy of Utah is to treat both males and females as adults at the younger age. By suggesting these two options, we do not mean to exhaust all other possibilities; we simply mention them to illustrate the fact that our opinion leaves open this state-law issue for the state courts to decide.

In 1975 this Court held § 15-2-1 of the Utah Code unconstitutional and directed the State of Utah to eliminate that statute's discrimination between males and females. Utah was free to select the age of 21 or the age of 18 as the age of majority for all its citizens. Thereafter as Justice Ellett pointed out in his separate opinion, the "Legislature of Utah, in an attempt to satisfy the justices of the Supreme Court of the United States, passed an amendment to Section 15-2-1, U. C. A. 1953, so that it now reads: 'The period of minority extends in males and females to the age of eighteen years . . . .' "[1] This amendment applied only after its passage in 1975.

When this case reached the Utah Supreme Court for the second time in 1976, that court held that the pre-amendment age of majority was 18. The reasons given in the three separate opinions of the Justices constituting the majority of the court are not, in my judgment, nearly as persuasive as Justice Maughan's dissenting opinion. But, as Justice Maughan clearly recognized, the state court had the power to decide that the age of majority for both males and females under this statute prior to its amendment was either 18 or 21. The Utah Supreme Court has now held that it was 18. Even though the explanation of that holding makes reference only to females, once that determination has been made as a matter of Utah law, it applies by force of the Federal Constitution to males as well as females. Accordingly, both before and after the 1975 amendment to § 15-2-1, the statutory age of majority for both males and females in Utah was 18, not 21. The lower Utah courts are so interpreting the Utah Supreme Court decision.[2]

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[1] 552 P. 2d 112, 113 (1976).

[2] Appellee's statement to that effect in his Motion to Dismiss 3, 10, is not disputed.

The judgment of the Utah Supreme Court was therefore consistent with this Court's mandate, except, of course, for its disallowance of costs. Other than an order allowing appropriate costs, there is no need for any further proceedings (or opinion writing) in that court. I therefore respectfully dissent from this Court's action.

Syllabus

# NATIONAL LABOR RELATIONS BOARD *v.* ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE & GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-777. Argued October 6, 1976—Decided February 22, 1977

A subcontractor (Hudik) had a subcontract with a general contractor (Austin) for the heating, ventilation, and air-conditioning work in the construction of a home for the aged. The subcontract job specifications provided that Austin would purchase certain climate-control units manufactured by Slant/Fin Corp. to be installed in the home, and that the internal piping in these units was to be cut, threaded, and installed at the Slant/Fin factory. However, the collective-bargaining agreement between respondent union and Hudik provided that pipe threading and cutting were to be performed on the jobsite. When the units arrived on the job, the union steamfitters employed by Hudik refused, at the union's instigation, to install them on the ground that the factory-installed internal piping violated the collective-bargaining agreement and was steamfitters' work. Austin then filed a complaint with the National Labor Relations Board, alleging that the union had committed an unfair labor practice under § 8 (b) (4) (B) of the National Labor Relations Act, which makes it an unfair labor practice for a union to induce employees to refuse to handle particular goods or products or coerce any person, where "an object" of the inducement or coercion is to require any person to cease doing business with any other person, provided that the section shall not be construed to make unlawful any primary strike or primary picketing. Specifically, Austin charged that the union's action was taken to force Hudik to cease doing business with Austin and to force Hudik and Austin to cease dealing with Slant/Fin's products. The Administrative Law Judge held that the union had violated § 8 (b) (4) (B), because in seeking to enforce the collective-bargaining agreement and to obtain the work the union's object was in reality to influence Austin by exerting pressure on Hudik, an employer who had no power to award the work to the union. The NLRB agreed, noting that although the union's refusal to install the climate-control units was based on a valid work-preservation clause in the collective-bargaining agreement, the pressure exerted by the union on Hudik was undertaken for its effect on other employers, and thus was secondary and prohibited by § 8 (b) (4) (B). The Court of Appeals set aside the NLRB's cease-and-desist order, disagreeing with the NLRB on both legal and factual grounds. *Held:* The union's refusal to install the climate-control units was secondary activity prohibited by § 8 (b) (4) (B), rather than primary activity beyond the reach of that provision. Pp. 514–532.

(a) The existence of a work-preservation agreement is not an adequate defense to a § 8 (b) (4) (B) unfair labor practice charge. To hold, as the Court of Appeals did, that a work stoppage is necessarily primary and not an unfair labor practice when it aims at enforcing a legal promise in a collective-bargaining agreement is inconsistent with the statute as construed in *Carpenters* v. *NLRB,* 357 U. S. 93 (*Sand Door*), a construction that was accepted and that has never been abandoned by Congress. Pp. 514–521.

(b) The Court of Appeals also erred in taking the view that the NLRB's "control" test, under which the union commits an unfair labor practice under § 8 (b) (4) (B) when it coerces an employer in order to obtain work that the employer has no power to assign, is invalid as a matter of law because it fails to comply with the standard of *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, that the union's conduct be judged in light of all the relevant circumstances. It does not appear that either the Administrative Law Judge or the NLRB, in agreeing with him, articulated a different standard from that recognized as proper in *National Woodwork,* or that the NLRB, in applying its control test failed to consider all of the relevant circumstances. Pp. 521–528.

(c) The record amply supports the NLRB's conclusion that the union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by § 8 (b) (4) (B). Pp. 528–531.

(d) The Court of Appeals was obliged to review the case under the statutory standard of whether the NLRB's findings were "supported by substantial evidence on the record considered as a whole," and thus in reweighing the facts and setting aside the NLRB's order, the Court of Appeals improperly substituted its own views of the facts for those of the NLRB. Pp. 531–532.

172 U. S. App. D. C. 225, 521 F. 2d 885, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BREN-

NAN, J., filed a dissenting opinion, in which STEWART (except for Part V) and MARSHALL, JJ., joined, *post*, p. 532. STEWART, J., filed a dissenting statement, *post*, p. 543.

*Norton J. Come* argued the cause for petitioner. With him on the brief were *Solicitor General Bork, John S. Irving,* and *Jay E. Shanklin.*

*Laurence Gold* argued the cause for respondent. With him on the brief were *Patrick C. O'Donoghue, Donald J. Capuano,* and *George Kaufmann.*[*]

MR. JUSTICE WHITE delivered the opinion of the Court.

Under § 8 (b)(4)(B) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(B),[1] a union commits an unfair

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[*] Briefs of *amici curiae* urging reversal were filed by *Kenneth C. McGuiness, Robert E. Williams,* and *Douglas S. McDowell* for the Air-Conditioning and Refrigeration Institute et al.; by *Richard C. Hotvedt* for the Associated General Contractors of America, Inc., et al.; and by *Vincent J. Apruzzese* and *Francis A. Mastro* for the Public Service Electric & Gas Co. et al.

*Gerard C. Smetana, William H. DuRoss III,* and *Lawrence B. Kraus* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

[1] Section 8 (b) of the National Labor Relations Act, as set forth in 29 U. S. C. § 158 (b), provides in relevant part:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, labor practice when it induces employees to refuse to handle particular goods or products or coerces any person engaged in commerce, where "an object" of the inducement or coercion is to require any person to cease doing business with any other person. A proviso, added to § 8 (b)(4)(B) in 1959, declares that the section "shall [not] be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." Although without the proviso the section on its face would seem to cover any coercion aimed at forcing a cessation of business, the National Labor Relations Board (Board) and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing.[2]

Among other things, it is not necessarily a violation of § 8 (b)(4)(B) for a union to picket an employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer. *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612 (1967) (*National Woodwork*). The question now before us is whether a union seeking the kind of work traditionally performed by its members at a construction site violates § 8 (b)(4)(B) when it induces its members to engage in a work stoppage against an employer who does not have control over the assignment of the work

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processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

[2] The pre- and post-1959 developments are fully canvassed in *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612 (1967).

sought by the union. More specifically, the issue is whether a union-instigated refusal of a subcontractor's employees to handle or install factory-piped climate-control units, which were included in the general contractor's job specifications and delivered to the construction site, was primary activity beyond the reach of § 8 (b)(4)(B) or whether it was secondary activity prohibited by the statute. As we shall see, this issue turns on whether the boycott was "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," *National Woodwork, supra,* at 645, and is therefore primary conduct, or whether the boycott was "tactically calculated to satisfy union objectives elsewhere," 386 U. S., at 644, in which event the boycott would be prohibited secondary activity.

## I

Austin Co., Inc. (Austin), was the general contractor and engineer on a construction project known as the Norwegian Home for the Aged.[3] As the result of competitive bidding, Austin awarded a subcontract to Hudik-Ross Co., Inc. (Hudik), to perform the heating, ventilation, and air-conditioning work for the Norwegian Home construction. Hudik employs a regular complement of about 10 to 20 steamfitters. For many years, these employees have been represented by respondent Enterprise Association (Enterprise), a plumbing and pipefitting union. Over the years Hudik and Enterprise have entered into successive collective-bargaining agreements, and such an agreement was in force at the time that the dispute involved in the present litigation arose. Austin had no agreement with Enterprise regarding the work to be done on the Norwegian Home project.

The subcontract between Austin and Hudik incorporated Austin's job specifications. These specifications provided that

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[3] The facts here stated are taken from the findings made by the Administrative Law Judge and adopted by the Board. *Enterprise Assn. of Steam Pipefitters,* 204 N. L. R. B. 760 (1973).

Austin would purchase certain climate-control units manufactured by Slant/Fin Corp. (Slant/Fin) to be installed in the Norwegian Home. The specifications further provided that the internal piping in the climate-control units was to be cut, threaded, and installed at the Slant/Fin factory. At the time that Hudik entered into the subcontract with Austin, Hudik was aware that its employees would be called upon to install the Slant/Fin units but not to do the internal piping work for the units on the jobsite.

Traditionally, members of respondent union have performed the internal piping on heating and air-conditioning units on the jobsite. Also, Rule IX of the then-current collective-bargaining contract between Hudik and Enterprise provided that pipe threading and cutting were to be performed on the jobsite in accordance with Rule V, which in turn specified that the work would be performed by units of two employees.[4] There had been similar or identical provisions in previous collective-bargaining contracts. There is no dispute that the work designated by Austin's specifications to be performed at the Slant/Fin factory was the kind of cutting and threading work referred to in Rule IX.

When the Slant/Fin units arrived on the job, the union steamfitters refused to install them. The business agent of the union told Austin's superintendent that the steamfitters

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[4] Rule IX provided in relevant part:

"Radiator branches, convector branches and coil connections shall be cut and threaded by hand on the job in accordance with Rule V." App. 89.

Rule V provided:

"MEN TO WORK IN UNITS OF TWO

"All work to be performed within the jurisdiction of Enterprise Association must be performed by journeymen steamfitters or apprentices working in units of two, one of whom must be a steamfitter. A unit shall be composed of:

"A. Steamfitter with a steamfitter, or

"B. Steamfitter with an apprentice." *Id.*, at 87–88.

"would not install the Slant/Fin units because the piping inside the units was steamfitters' work." *Enterprise Assn. of Steam Pipefitters,* 204 N. L. R. B. 760, 762 (1973). Hudik was informed that the factory-installed internal piping in the units was in violation of Rule IX of the union contract and "that such piping was Local 638's work." *Ibid.* When the union persisted in its refusal to install the units, thereby interfering with the completion of the Norwegian Home job, Austin filed a complaint with the Board, alleging that Enterprise had committed an unfair labor practice under § 8 (b)(4)(B) of the National Labor Relations Act by engaging in a strike and encouraging Hudik employees to refuse to install the Slant/Fin units in furtherance of an impermissible object. Specifically, Austin charged that the union's action was taken to force Hudik to cease doing business with Austin and to force Hudik and Austin to cease dealing with the products of Slant/Fin. The union's position before the Administrative Law Judge was that it was merely seeking to enforce its contract with Hudik and to preserve the jobsite cutting and threading work covered by Rule IX.

The Administrative Law Judge found that because Austin had specified factory-piped units, there was no internal threading and cutting work to be done on the jobsite of the kind covered by Rule IX and that no such work at the Norwegian Home project could be obtained through pressure on Hudik alone, even if Hudik was forced to abandon its contract, unless and until Austin changed its job specifications so as to provide the piping the union members had traditionally performed for Hudik as a subcontractor. The Administrative Law Judge thus concluded that the union had violated § 8 (b)(4)(B) because in seeking to enforce its contract and to obtain the work at the Norwegian Home jobsite, the union's object was in reality to influence Austin by exerting pressure on Hudik, an employer who had no power to award the work to the union.

The Board agreed. *Enterprise Assn., supra.* It noted first that the steamfitters' refusal to install the Slant/Fin units "was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and was for the purpose of preserving work they had traditionally performed." 204 N. L. R. B. 760. This did not settle the legality of the work stoppage under § 8 (b)(4)(B), however; for "Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place. . . . Respondent was exerting prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin. Since the pressure exerted by the Respondent on Hudik was undertaken for its effect on other employers, this pressure was secondary and prohibited by Section 8 (b)(4)(B)." *Ibid.* (as amended by order of Aug. 30, 1973).

A divided Court of Appeals for the District of Columbia Circuit, sitting en banc, set aside the Board's order. 172 U. S. App. D. C. 225, 521 F. 2d 885 (1975). We granted certiorari because of an apparent conflict between the Circuits.[5] 424 U. S. 908 (1976).

## II

In setting aside the Board's order, the Court of Appeals disagreed with the Board on both legal and factual grounds. We deal first with the Court of Appeals' proposition that "an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees can [n]ever be considered a neutral bystander in a dispute not his own." 172 U. S. App. D. C., at 243, 521 F. 2d, at 903 (footnote omitted). Under this view, a strike or refusal to handle undertaken to enforce such a contract would not itself warrant an inference that the union sought to satisfy secondary, rather than primary, objectives, whatever the impact on the immediate employer or on other employers might be. Thus, where a union seeks to enforce a work-preservation agreement by a strike or work stoppage, the existence of the agreement would always provide an adequate defense to a § 8 (b)(4) unfair labor practice charge. This approach is untenable under the Act and our cases construing it.

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[5] For a discussion of the decisions of the Courts of Appeals on the issues presented in this case see n. 15, *infra*.

*Carpenters* v. *NLRB*, 357 U. S. 93 (1958) (*Sand Door*), involved a collective-bargaining contract containing a provision, then quite legal, that " 'workmen shall not be required to handle non-union material.' " *Id.*, at 95. The case arose when certain nonunion doors arrived at a construction site and the union notified the contractor that the doors would not be hung. The Board found that the union had committed an unfair labor practice by encouraging employees to strike or refuse to handle the disputed doors in order to force the contractor to cease doing business with the door manufacturer. The union stood squarely on the contract; and as the case arrived here the sole question was whether the collective-bargaining provision was a "defense to a charge of an unfair labor practice under § 8 (b)(4)(A) when, in the absence of such a provision, the union conduct would unquestionably be a violation."[6] *Id.*, at 101.

The union argued that if the statute was aimed at protecting neutral employers from becoming involuntarily involved in the labor disputes of others, "protection should not extend to an employer who has agreed to a hot cargo provision, for such an employer is not in fact involuntarily involved in the dispute," especially "when the employer takes no steps at the time of the boycott to repudiate the contract and to order his employees to handle the goods." In such circumstances, "[t]he union does no more than inform the employees of their contractual rights and urge them to take the only action effective to enforce them." *Id.*, at 105. These arguments were squarely rejected:

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[6] Section 8 (b)(4)(A) was renumbered as § 8 (b)(4)(B) in 1959. As we shall see, no substantive changes made by the 1959 amendments had any effect on the rule established in *Sand Door*.

> "Nevertheless, it seems most probable that the freedom of choice for the employer contemplated by § 8 (b)(4) (A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties. See *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 364. This is so because by the employer's intelligent exercise of such a choice under the impact of a concrete situation when judgment is most responsible, and not merely at the time a collective bargaining agreement is drawn up covering a multitude of subjects, often in a general and abstract manner, Congress may rightly be assumed to have hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited." *Id.*, at 105–106.

The Court went on to hold that inducements of employees that are prohibited by § 8 (b)(4) in the absence of a contractual provision countenancing them "are likewise prohibited when there is such a provision," 357 U. S., at 106. This was true even though the making and voluntary observance of such contracts were not contrary to law at the time that *Sand Door* was decided; however lawful, these contracts could not be enforced "by the means specifically prohibited" by the section. *Id.*, at 108. The Court held that the legality of the union's conduct is to be viewed at the time of the boycott.

*Sand Door*'s holding that employer promises in a collective-bargaining contract provide no defense to a § 8 (b)(4) charge against a union has not been disturbed. In contemplating the 1959 amendments to the Landrum-Griffin Act, Congress viewed that part of *Sand Door* in which the Court suggested that contractual provisions having secondary objectives were not forbidden by law as creating a loophole in the Act. Section 8 (e) was enacted to close that loophole. See *National Woodwork,* 386 U. S., at 634. Section 8 (e), 29 U. S. C. § 158 (e) (1970 ed., Supp. V), makes it an unfair labor practice, with provisos, for unions and employers to enter into collective-bargaining contracts whereby the employer ceases or agrees to cease doing business with any other person. Although on its face not limited to agreements having secondary objectives, the section was construed by the Board and this Court as only closing the loophole left by *Sand Door* and as having no broader reach than § 8 (b)(4) itself. Section 8 (e) does not prohibit agreements made for "primary" purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them. 386 U. S., at 635.

By no stretch of the imagination, however, can it be thought, that in enacting § 8 (e) Congress intended to disagree with or ease *Sand Door*'s construction of § 8 (b)(4), under which a perfectly legal collective-bargaining contract may not be enforced by a strike or refusal to handle which in the absence of such a provision would be a violation of the statute. The intention of Congress as to this aspect of *Sand Door* could not be clearer. A proviso to § 8 (e) exempted from that section certain agreements in the construction industry that the section would otherwise have prohibited, but the Committee Report explained that the "proviso applies only to section 8 (e) and therefore leaves unaffected the law developed under section 8 (b)(4)," noting particularly that picketing to enforce agreements saved by the proviso "would be illegal under the *Sand Door* case." H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39 (1959), 1 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, p. 943 (1959) (hereafter 1 Leg. Hist.). Undoubtedly, Congress embraced the rule then followed by the Board and approved by this Court in *Sand Door* that a contract permitting or justifying the challenged union conduct is no defense to a § 8 (b)(4) charge. To hold, as the Court of Appeals did, that a work stoppage is necessarily primary and not an unfair labor practice when it aims at enforcing a legal promise in a collective-bargaining contract is inconsistent with the statute as construed in *Sand Door,* a construction that was accepted and that has never been abandoned by Congress.

Nor did we modify *Sand Door* in *National Woodwork.* The union in *National Woodwork* induced the employees of four contractors not to handle precut and prefitted doors that had arrived at the respective construction sites. In three instances, the precut doors had been specified by the architect or the owner; in the fourth, the decision to use precut doors was that of the immediate contractor-employer, Frouge Corp. In each case, there was a provision in the collective-bargaining contract that carpenters would not be required to handle precut or prefitted doors.[7] The General Counsel of the Board filed charges in all four cases, asserting that the agreements were forbidden by § 8 (e) and that the refusal to handle in each case violated § 8 (b)(4)(B). The trial examiner, whose findings were adopted by the Board, concluded that none of the agreements was invalid on its face but that in seeking to enforce the contract by refusing to handle in the three situations where the doors had been specified by the architect or owner, the union had violated § 8 (b)(4)(B). In these situations, the legality of the contract no more immunized the work stoppage from the § 8 (b)(4) charge than would "the then-lawful 'hot-cargo' clause in the *Sand Door* case." *Metropolitan Dist. Council of Phila.*, 149 N. L. R. B. 646, 658 (1964). On the other hand, in the Frouge situation, where the choice lay with the contractor who "therefore was in a position to . . . settle the dispute with the District Council by granting its request to assign that work to the carpenters on the jobsite," *id.*, at 659 n. 21, the union was seeking only to regulate the relations between the general contractor and his own employees and to protect a legitimate economic interest of the employees by preserving their unit work. Neither the execution nor the enforcement of the Frouge agreement violated the Act. Only the Frouge decision was appealed. The Court of Appeals for the Seventh Circuit reversed in part, concluding that the Frouge agreement was prohibited by § 8 (e).

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[7] Part of the same contractual rule provided that "'[n]o employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America.'" *National Woodwork,* 386 U. S., at 615 n. 2. The Board found that this sentence violated § 8 (e). This finding, consistent with prevailing law, was not challenged by the union. See, *e. g., NLRB* v. *Amalgamated Lithographers of America,* 309 F. 2d 31, 35–36 (CA9 1962), cert. denied, 372 U. S. 943 (1963); *Employing Lithographers of Greater Miami* v. *NLRB,* 301 F. 2d 20, 29–30 (CA5 1962).

In reversing the Court of Appeals' § 8 (e) holding and agreeing that § 8 (b)(4)(B) had not been violated, we held that neither the Frouge contract nor its maintenance was illegal. Our rationale was *not* that the work-preservation provision was valid under § 8 (e) and that *therefore* it could be enforced by striking or picketing without violating § 8 (b)(4)(B). Expressly recognizing the continuing validity of the *Sand Door* decision that a valid contract does not immunize conduct otherwise violative of § 8 (b)(4), 386 U. S., at 634, we held that neither § 8 (b)(4)(B) nor § 8 (e) forbade primary activity by employees designed to preserve for themselves work traditionally done by them and that on this basis the union's conduct violated neither section. To determine whether the Frouge employees' refusal to handle was permissible primary activity or was forbidden secondary coercion, we inquired:

> "[Whether] under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." 386 U. S., at 644–645 (footnotes omitted).

We went on to rule that there was substantial evidence to sustain the finding of the Board that both the agreement and the union activity at the Frouge jobsite related solely to the preservation of the traditional tasks of the jobsite carpenters. In consequence, we agreed that there was neither a § 8 (b)(4)(B) nor a § 8 (e) unfair labor practice.

There is thus no doubt that the collective-bargaining provision that pipes be cut by hand on the job and that the work be conducted by units of two is not itself a sufficient answer to a § 8 (b)(4)(B) charge. The substantial question before us is whether, with or without the collective-bargaining contract, the union's conduct at the time it occurred was proscribed secondary activity within the meaning of the section. If it was, the collective-bargaining provision does not save it. If it was not, the reason is that § 8 (b)(4)(B) did not reach it, not that it was immunized by the contract. Thus, regardless of whether an agreement is valid under § 8 (e), it may not be enforced by means that would violate § 8 (b)(4).[8]

## III

The Court of Appeals was also of the view that the Board's "control" test, under which the union commits an unfair labor practice under § 8 (b)(4)(B) when it coerces an employer in order to obtain work that the employer has no power to assign, is invalid as a matter of law because it fails to comply with the *National Woodwork* standard that the union's conduct be judged in light of all the relevant circumstances. Again, we think the Court of Appeals was in error.

As we have seen, in *National Woodwork* the Board found unfair labor practices in three instances by inferring an improper secondary objective from the fact that the work sought by the union was not under the control of the immediate employer, but it found no unfair practice in the Frouge situation because Frouge did have the power to settle the dispute with the union. In sustaining the Board with respect to Frouge and in posing the issue whether under all the circumstances the boycott was tactically calculated to satisfy union objectives elsewhere, we did not purport to announce a new legal standard and then ourselves to assess the facts in light of the modified construction of the statute. Such an assessment would have been a more proper task for the Board in the first instance;[9] yet there was no remand for further proceedings in the light of a newly fashioned standard. The Board had sustained the trial examiner, who had examined the facts to determine whether the agreement and boycott had secondary objectives and concluded that they did not. This Court simply sustained the Board's findings as supported by substantial evidence, without questioning either the legal standard employed by the Board or the Board's resolution of the facts under that standard. Furthermore, the Court expressly recognized that as the case came to it, no question was raised about the results with respect to the three contractors other than Frouge. 386 U. S., at 616-617, n. 3.

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[8] The validity of the will-not-handle provision in this case was not challenged by the charging party, and the Board referred to it as a valid provision. Because the scope of the prohibitions in §§ 8 (b)(4)(B) and 8 (e) are essentially identical, except where the proscriptions in § 8 (e) are limited by the provisos in that section, the Court of Appeals regarded as anomalous that a valid provision in a collective-bargaining contract could not be enforced through economic pressure exerted by the union. This conclusion ignores the substance of our decision in *Sand Door*. Even though a work-preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by § 8 (b)(4)(B). See *George Koch Sons, Inc.* v. *NLRB*, 490 F. 2d 323, 327 (CA4 1973).

Nor does the Board's decision undermine the collective-bargaining process as the Court of Appeals suggests. In appropriate circumstances, the Board has not found the lack of control to be determinative, *Painters Dist. Council No. 20* (*Uni-Coat*), 185 N. L. R. B. 930 (1970), and the Board has declared its intention to continue to eschew a mechanical application of its control test in order to ascertain whether the struck employer is truly an unoffending employer. See *Local 438, United Pipe Fitters* (*George Koch Sons, Inc.*), 201 N. L. R. B. 59, 64 (1973).

Here, the Administrative Law Judge, cognizant of *National Woodwork* and the Board's own precedents, examined the history both of the relevant jobsite work traditionally done by the steamfitters and of the contractual provision calling for jobsite cutting and threading of pipe, assessed the agreement and refusal to handle in light of the actual conditions in the New York market, and concluded that " 'under all the surrounding circumstances,' " Hudik was "only a means or instrumentality for exerting pressure against Slant/Fin and Austin with whom the Union has its primary dispute." [10] It thus does not appear to us that either the Administrative Law Judge or the Board, in agreeing with him, articulated a different standard from that which this Court recognized as the proper test in *National Woodwork*.[11]

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[9] "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943). This rule has not been disturbed. See *FPC* v. *Texaco, Inc.*, 417 U. S. 380, 397 (1974); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972); K. Davis, Administrative Law Treatise § 16.01, p. 397 (Supp. 1976). When an administrative agency has made an error of law, the duty of the Court is to "correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law." *ICC* v. *Clyde S. S. Co.*, 181 U. S. 29, 32-33 (1901).

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[10] 204 N. L. R. B., at 764. The Administrative Law Judge concluded that Austin and Slant/Fin were primary employers. The Board, while adopting the remainder of the Administrative Law Judge's report, did not reach this question.

[11] The Board addressed the question in *George Koch Sons, Inc., supra.* The Board recognized that there had been some ambiguity on this issue in earlier decisions.

"Specifically, of late, the Board has characterized its approach simply in terms of a right-of-control test. The test as stated would seem to imply that the Board looked solely at the pressured employer's 'contract right to control' the work at issue at the time of the pressure to determine whether that pressure was primary or secondary. In fact, this is not now the Board's approach nor was it ever.

"Rather, the Board has always proceeded with an analysis of (1) whether under all the surrounding circumstances the union's objective was work preservation and then (2) whether the pressures exerted were directed at the right person, i. e., at the primary in the dispute. . . . In following this approach, however, our analysis has not [been] nor will it ever be a mechanical one, and, in addition to determining, under all the surrounding circumstances, whether the union's objective is truly work preservation, we have studied and shall continue to study not only the situation the pressured employer finds himself in but also how he came to be in that situation. And if we find that the employer is not truly an 'unoffending employer' who merits the Act's protections, we shall find no violation in a union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation." 201 N. L. R. B., at 64 (footnotes omitted).

Nor is it the case that the Board, in applying its control standard, failed to consider all of the relevant circumstances. Surely the fact that the Board distinguishes between two otherwise identical cases because in the one the employer has control of the work and in the other he has no power over it does not indicate that the Board has ignored any material circumstance. The contrary might more rationally be inferred. Of course, the Board may assign to the presence or absence of control much more weight than would the Court of Appeals, but this far from demonstrates a departure from the totality-of-the-circumstances test recognized in *National Woodwork.*[12]

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[12] The Board also adopted the Administrative Law Judge's discussion of the economic context in which the dispute arose.

The Administrative Law Judge was of the view that union pressure on Austin and other contractors who preferred factory-piped units could effectively foreclose Slant/Fin and similar producers from the market. The Board did not disturb the Administrative Law Judge's findings:

"If prepaid units cannot be installed in the large commercial, public, and industrial buildings in the New York area or in other areas effectively organized by the Union and other building trades unions, the manufacture will be materially affected and Austin and other engineers and general contractors will not specify their purchase and use in buildings." 204 N. L. R. B., at 764.

"In my opinion, it is an appropriate subject of official notice that in New York City and probably in all or most of the major cities in this country, the building and construction industry is unionized, certainly with respect to major industrial, commercial, and public construction. Unionized in this context means that craft unions affiliated with the AFL-CIO represent and have contracts for the employees who work on such projects and, in fact, the unions are the source of the labor supply and furnish the employees to the employer-contractors. The strategic position of the unions in the industry is confirmed by the fact that governmental efforts to increase the number of minority employees in the industry are concentrated on the unions and not on the employers. In most industries, if it is desired to increase the number of minority employees, governmental pressure is effectively directed to the employers. But in the construction industry it is the unions that control the labor supply and if the union steamfitter employees of Hudik on the Norwegian

There is little or no basis in the statute, its legislative history, or our cases for the Court of Appeals' conclusion that the distinction the Board has drawn between those cases where the struck employer is in position to deliver the work to the union and those where the work is controlled by others is erroneous as a matter of law. The Board has taken this approach in applying § 8 (b)(4) at least since 1958, when it decided *Clifton Deangulo,* 121 N. L. R. B. 676. In that case, the facts of which were similar to this one, Limbach, a plumbing and heating contractor, was engaged to install certain comfort induction units. The union claimed that certain provisions in its collective-bargaining agreement with Limbach reserved to its members much of the work that had been performed at the factory on these units. Therefore, at the union's behest, the employees refused to handle the units. Relying on its decision in the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters & Joiners,* 113 N. L. R. B. 1210 (1955), and ruling against the union, the Board rejected the union's "main contentions . . . that the dispute was with Limbach, who was the primary employer; that the Union was seeking merely to exercise a valid contractual right to which Limbach had voluntarily agreed in advance, and that it was therefore engaged in privileged primary activity, not in proscribed secondary activity." 121 N. L. R. B., at 684. The Board also observed that Limbach "had given to union members all work within the Union's jurisdiction which it had been awarded on the project. It was powerless, of course, to give them additional work which it had not obtained and which, in fact, had been reserved by the very contractor through whom it had derived its own standing as an employer on the job." *Id.,* at 685–686.

Since that time, as its decision in *National Woodwork* exemplifies, the Board has continued to interpret and apply

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job refuse to work, other steamfitters will not be available to Hudik or to anyone else to perform work on the job." *Id.,* at 764 n. 10.

§ 8 (b)(4)(B) to find an unfair labor practice, at least where the union employs a product boycott to claim work that the immediate employer is not in a position to award,[13] and it has declined to find a violation where the employer has such power, even if awarding the work might cause him to terminate contractual relations with another employer.[14] In the latter circumstances, the cease-doing-business consequences are merely incidental to primary activity, but not in the former where the union, if it is to obtain work, must intend to exert pressure on one or more other employers.

No legislative disagreement with the Board's interpretation of § 8 (b)(4) was expressed in 1959 when Congress amended the section. On the contrary, in adding the primary-secondary proviso to the section, as the relevant reports clearly show, Congress intended merely to reflect the existing law. "This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law." H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 38 (1959), 1 Leg. Hist. 942.

Furthermore, the Courts of Appeals regularly sustained the relevant Board interpretations of § 8 (b)(4), and we did not question the Board's approach in *National Woodwork,* let alone overrule it *sub silentio.* It is true that since our decision in that case some Courts of Appeals, like the Court of Appeals for the District of Columbia Circuit, have concluded that the Board's interpretation of the statute is in error.[15]

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[13] See, *e. g., George Koch Sons, Inc., supra; International Assn. of Heat & Frost Insulators, Local 12,* 193 N. L. R. B. 40 (1971); *Enterprise Assn., Local 638,* 183 N. L. R. B. 516 (1970); *Local 742, Carpenters,* 178 N. L. R. B. 351 (1969); *Local 636, Plumbers & Pipefitters,* 177 N. L. R. B. 189 (1969); *Pipe Fitters Local No. 120,* 168 N. L. R. B. 991 (1967); *International Assn. of Heat & Frost Insulators, Local 53,* 149 N. L. R. B. 1075 (1964); *Ohio Valley Carpenters Dist. Council,* 144 N. L. R. B. 91 (1963); *International Longshoremen's Assn.,* 137 N. L. R. B. 1178 (1962); *Local 5, United Assn. of Journeymen,* 137 N. L. R. B. 828 (1962); *Enterprise Assn., Local 638,* 124 N. L. R. B. 521 (1959); *Local 636, United Assn. of Journeymen,* 123 N. L. R. B. 225 (1959).

[14] See, *e. g., Pipefitters Local No. 120, supra,* at 992; *Metropolitan Dist. Council of Phila.,* 149 N. L. R. B. 646, 659 n. 21 (1964) (*National Woodwork*).

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[15] Prior to this Court's decision in *National Woodwork,* the Courts of Appeals had uniformly held that it was a violation of § 8 (b)(4)(B) for a union to use economic pressures to obtain work that was not within the struck employer's power to award. See *Ohio Valley Carpenters Dist. Council* v. *NLRB,* 339 F. 2d 142 (CA6 1964); *NLRB* v. *Int'l Longshoremen's Assn.,* 331 F. 2d 712 (CA3 1964); *Local No. 5, United Assn. of Journeymen* v. *NLRB,* 116 U. S. App. D. C. 100, 321 F. 2d 366, cert. denied, 375 U. S. 921 (1963); *NLRB* v. *Enterprise Assn.,* 285 F. 2d 642 (CA2 1960); *Local No. 636, United Assn. of Journeymen* v. *NLRB,* 108 U. S. App. D. C. 24, 278 F. 2d 858 (1960). Generally, the Courts of Appeals did not treat the Board's control test as a *per se* rule, reasoning instead that the absence of the right to control the work sought is strong evidence that the objective of the economic pressure being applied by the union is to affect someone other than the struck employer.

In many of the pre-*National Woodwork* cases the unions argued that their activity was primary on the ground that they were merely enforcing valid work-preservation agreements. The Courts of Appeals uniformly rejected this argument for a variety of reasons. Two of the pre-*National Woodwork* cases flatly held that the existence of a valid work-preservation agreement cannot validate conduct that otherwise would be unlawful under § 8 (b)(4)(B). *Ohio Valley Carpenters, supra,* at 145; *Local No. 5, supra,* at 369–370.

Since this Court's decision in *National Woodwork,* six Circuits have addressed the control issue. The Fourth Circuit in a well-reasoned opinion has expressly sustained the Board's control test. *George Koch Sons, Inc.* v. *NLRB,* 490 F. 2d 323 (1973). The Ninth Circuit has done the same. See *Associated General Contractors of California* v. *NLRB,* 514 F. 2d 433 (1975). But see *Western Monolithics Concrete Products* v. *NLRB,* 446 F. 2d 522 (CA9 1971).

The Third, Eighth, and District of Columbia Circuits have rejected the Board's control theory. In addition to the District of Columbia Circuit's opinion in the present case, see *Local No. 636, United Assn. of Journeymen* v. *NLRB,* 139 U. S. App. D. C. 165, 430 F. 2d 906 (1970); *American Boiler Mfrs. Assn.* v. *NLRB,* 404 F. 2d 556 (CA8 1968); *NLRB* v. *Local 164, Int'l Brotherhood of Electrical Workers,* 388 F. 2d 105 (CA3 1968). The First Circuit has said the same thing in dictum. *Beacon Castle Square Bldg. Corp.* v. *NLRB,* 406 F. 2d 188 (1969).

The Board's reading and application of the statute involved in this case, however, are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers. See *Bayside Enterprises* v. *NLRB*, 429 U. S. 298, 303–304 (1977); *NLRB* v. *Boeing Co.*, 412 U. S. 67, 75 (1973); *NLRB* v. *United Insurance Co. of America*, 390 U. S. 254, 260 (1968); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Sand Door*, 357 U. S., at 107.

## IV

Wholly apart from its determination that the union's conduct was justified as a measure to enforce its collective-bargaining contract and that the Board applied an incorrect standard for determining liability, the Court of Appeals held that since there was "no substantial evidence . . . in this record that the union's purpose was also 'to satisfy union objectives elsewhere,' the Board's decision holding the union guilty of a Section 8 (b)(4)(B) violation may not stand." 172 U. S. App. D. C., at 244, 521 F. 2d, at 904. We disagree.

That there existed inducement and coercion within the meaning of § 8 (b)(4) is not disputed. The issue is whether "an object" of the inducement and the coercion was to cause the cease-doing-business consequences prohibited by § 8 (b)(4), the resolution of which in turn depends on whether the product boycott was "addressed to the labor relations of [Hudik] . . . *vis-à-vis* his own employees," *National Woodwork*, 386 U. S., at 645, or whether the union's conduct was "tactically calculated to satisfy [its] objectives elsewhere," *id.*, at 644.[16]

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[16] The dissenters now assert a different definition of what constitutes prohibited secondary activity:

"If the purpose of a contract provision, or of economic pressure on an employer, is to secure benefits for that employer's own employees, it is primary; if the object is to affect the policies of some other employer

There is ample support in the record for the Board's resolution of this question. The union sought to enforce its contract with Hudik by a jobsite product boycott by which the

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toward his employees, the contract or its enforcement is secondary." *Post*, at 535.

*National Woodwork* did not, however, adopt this standard for applying the proscriptions of § 8 (b) (4) (B). The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit. There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer. *National Woodwork* itself embraced the view that the union's conduct would be secondary if its tactical object was to influence another employer:

"There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, *so long as the tactical object of the agreement and its maintenance is that employer, or* benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim." (Emphasis added.) 386 U. S., at 645.

Under the standard announced, we found no unfair labor practice in *National Woodwork*. Frouge, the struck employer, was faced with the choice of either giving the cutting and fitting work to its own employees or giving it to the door manufacturer. Cf. *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964). The Court sustained the Board's finding that the union's *sole* object was to influence Frouge to give the work to its own employees. The union thus had no object of influencing the door manufacturer, even though any influence that the union had on Frouge would have had an incidental effect on persons with whom Frouge had commercial dealings. Cf. *NLRB* v. *Operating Engineers*, 400 U. S. 297, 304 (1971) ("Some disruption of business relationships is the necessary consequence of the purest form of primary activity").

The *National Woodwork* opinion also noted that the Court then had no occasion "to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks." 386 U. S., at 630–631. That reservation was apparently meaningless, for under the theory of the dissent, seemingly derived from *National Woodwork* itself, striking workers may legally demand that their steamfitters asserted their rights to the cutting and threading work on the Norwegian Home project. It is uncontrovertible that the work at this site could not be secured by pressure on Hudik alone and that the union's work objectives could not be obtained without exerting pressure on Austin as well. That the union may also have been seeking to enforce its contract and to convince Hudik that it should bid on no more jobs where prepiped units were specified does not alter the fact that the union refused to install the Slant/Fin units and asserted that the piping work on the Norwegian Home job belonged to its members.[17] It was not error for

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employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of the striking employees. If, for example, Hudik had in the past used prepiped units without opposition from the union, and the union had demanded that Hudik not fulfill its contract with Austin on the Norwegian Home job—all for the benefit of Hudik employees—it would appear that the dissenters' approach would exonerate the union. Respondents take the same view. Tr. of Oral Arg. 22. We disagree, for the union's object would necessarily be to force Hudik to cease doing business with Austin, not to preserve, but to aggrandize, its own position and that of its members. Such activity is squarely within the statute.

Here, of course, the union sought to acquire work that it never had and that its employer had no power to give it, namely, the piping work on units specified by any contractor or developer who prefers and uses prepiped units. By seeking the work at the Norwegian Home, the union's tactical objects necessarily included influencing Austin; this conduct falls squarely within the statement of *National Woodwork* that a union's activity is secondary if its tactical object is to influence the boycotted employer.

[17] "It is not necessary to find that the *sole* object of the strike" was secondary so long as one of the union's objectives was to influence another employer by inducing the struck employer to cease doing business with that other employer. See *NLRB* v. *Denver Bldg. Council*, 341 U. S. 675, 689 (1951). See also *Wilson* v. *Milk Drivers & Dairy Employees, Local 471*, 491 F. 2d 200, 203 (CA8 1974); *Riverton Coal Co.* v. *United Mine Workers*, 453 F. 2d 1035, 1040 (CA6), cert. denied, 407 U. S. 915 (1972); *NLRB* v. *Milk Drivers & Dairy Employees, Local 584*, 341 F. 2d 29, 32 (CA2), cert. denied, 382 U. S. 816 (1965).

the Board to conclude that the union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by § 8 (b)(4)(B).[18]

The Court of Appeals was of the view that other inferences from the facts were possible. The court, for example, could "clearly see that it was possible for Hudik-Ross to settle the labor dispute which it had created. The record is void of any suggestion that Hudik-Ross attempted to negotiate a compromise with the union under which the union would have agreed to install the climate control units in exchange for extra pay or other special benefits." 172 U. S. App. D. C., at 239, 521 F. 2d, at 899. How this observation impugns the Board's finding with respect to the union's object is not clear. The union simply refused to handle the Slant/Fin units and asserted that under the contract the cutting and threading work belonged to them. The commonsense inference from these facts is that the product boycott was in part aimed at securing the cutting and threading work at the Norwegian Home job, which could only be obtained by exerting pressure on Austin.

The statutory standard under which the Court of Appeals was obliged to review this case was not whether the Court of Appeals would have arrived at the same result as the Board did, but whether the Board's findings were "supported by substantial evidence on the record considered as a whole." 29 U. S. C. § 160 (e). See *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112 (1956); *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 491 (1947); *Consolidated Edison Co.* v.

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[18] The dissenters assert that "[n]othing whatever in the record even remotely suggests that the union had any quarrel with Slant/Fin or Austin." *Post*, at 536 and 539–540. The Court has held, however, that there is no need for the Board to make such a finding in order to conclude that a § 8 (b)(4)(B) violation has occurred. *National Woodwork*, 386 U. S., at 645, quoted at n. 16, *supra*.

*NLRB*, 305 U. S. 197, 229 (1938). It appears to us that in reweighing the facts and setting aside the Board's order, the Court of Appeals improperly substituted its own views of the facts for those of the Board.

The judgment of the Court of Appeals is

*Reversed.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART (except for Part V) and MR. JUSTICE MARSHALL join, dissenting.

I dissent. Today's holding that union members exert secondary pressure in violation of § 8 (b)(4)(B) of the National Labor Relations Act by striking their own employer to protest his conceded violation of a lawful work-preservation provision in the parties' collective-bargaining agreement is patently precluded by *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612 (1967).

## I

Briefly to summarize the facts detailed in the Court's opinion, the collective-bargaining agreement between respondent union and Hudik-Ross Co. (Hudik), a heating and air-conditioning contractor, included a provision that Hudik's employees represented by the union would cut and thread the internal piping in climate-control units installed by Hudik. This is concededly work traditionally performed by them. Hudik, however, on obtaining a subcontract from the Austin Co. to install climate-control units, agreed with Austin to install prefabricated units manufactured by Slant/Fin Corp., whose employees had cut and threaded the internal piping before the units were delivered to the jobsite. The union thereupon informed both Hudik and Austin that, because of Hudik's breach of the collective-bargaining agreement, its members would not install the units.

The National Labor Relations Board concluded that the union's refusal to install the units constituted "prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin," and was therefore secondary pressure prohibited by § 8 (b)(4)(B). *Enterprise Assn. of Pipefitters*, 204 N. L. R. B. 760 (1973) (as amended by order of Aug. 30, 1973). The Board conceded that the refusal "was based on a valid work preservation clause in the agreement with Hudik . . . and was for the purpose of preserving work [the union's members] had traditionally performed," *ibid.*, but found nevertheless that the pressure was secondary because the union's primary dispute was necessarily with Austin, since Austin, and not Hudik, was in a position to control the assignment of the internal piping work, and therefore that Hudik, lacking such control, was a mere neutral in the dispute. The Court of Appeals for the District of Columbia Circuit, sitting en banc, rejected that analysis, 172 U. S. App. D. C. 225, 521 F. 2d 885 (1975), but the Court adopts it.

## II

The Court's result cannot be squared with *National Woodwork Mfrs. Assn.* v. *NLRB, supra,* whose totality-of-the-circumstances test the Court purports to apply. *Ante,* at 524. That case and this are virtually indistinguishable in relevant respects. The contractor in *National Woodwork* ordered precut and prefitted doors in violation of a collective-bargaining provision that doors would be cut and fitted by its own employees at the jobsite. When the workers refused to hang the doors, charges were filed alleging that the initial agreement violated § 8 (e) of the NLRA as an agreement "whereby [the] employer . . . agrees to cease or refrain from handling . . . any of the products of any other employer," and that union pressure to enforce it violated § 8 (b)(4)(B), as pressure intended to force the employer "to cease using . . . the product of any other . . . manufacturer . . . ."[1]

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[1] Section 8 (b)(4)(B) was added to the Act as § 8 (b)(4)(A) by the

The Court had no difficulty in rejecting this overliteral interpretation of the Act. The legislative history of the relevant sections, read in the context of the evolution of national labor policy, demonstrated that the Taft-Hartley prohibition of secondary boycotts, as refined by the Landrum-Griffin Amendments, had adopted the traditional distinction between primary and secondary activity, prohibiting the latter and permitting the former:

> "Congress, in enacting § 8 (b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* [v. *Deering,* 254 U. S. 443 (1921),] and *Bedford Cut Stone Co.* [v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37 (1927),] and barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere." 386 U. S., at 632.

While "[t]his will not always be a simple test to apply," *id.,* at 645, it is the test that Congress intended, and it has deep roots in the history of American labor policy.

*National Woodwork* exemplifies application of the test in precisely the factual context of the instant case: a dispute

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Taft-Hartley Act of 1947, and amended and renumbered by the Landrum-Griffin Act of 1959. For the history of these provisions, see *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 619–644 (1967). The present text of § 8 (b)(4)(B), in pertinent part, is set out in n. 1 of the Court's opinion, *ante,* at 509–510.

Section 8 (e) was added to the Act in 1959. It provides, in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . ." 29 U. S. C. § 158 (e) (1970 ed., Supp. V).

over the application of a negotiated work-preservation rule to the use of prefabricated materials in the construction industry. The crux of *National Woodwork* is the following passage:

> "The determination whether the 'will not handle' sentence of Rule 17 and its enforcement violated § 8 (e) and § 8 (b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *Id.*, at 644–645 (footnotes omitted).

Two principles follow from this passage. First, §§ 8 (b)(4)(B) and 8 (e) prohibit only conduct which is secondary, as that term has generally been understood in American labor law. If the purpose of a contract provision, or of economic pressure on an employer, is to secure benefits for that employer's own employees, it is primary; if the object is to affect the policies of some other employer toward his employees, the contract or its enforcement is secondary. Second, work preservation is necessarily a primary goal. Pressure undertaken in order to preserve work traditionally performed by unit members aims at benefits for those members, and centers on a conflict between the employees and their employer, which, although it has secondary effects on other employers, as does the use of almost any economic weapon in a labor dispute, can only be regarded as primary. Thus, if a contract clause is intended to preserve work, its objective, and the objective of pressure to enforce it, is primary, and therefore legitimate. Only if examination of "all the surrounding circumstances" indicated that the purpose of the clause is not work preservation, but rather "to satisfy union objectives elsewhere," would the provision violate § 8 (e) and its enforcement by economic pressure violate § 8 (b)(4)(B).

## III

The Court's acknowledgment that these principles must control the result here rings hollow in the face of its conclusion. For here, as in *National Woodwork,* the Board found that the union's actions were taken "for the purpose of preserving work [its members] had traditionally performed." 204 N. L. R. B., at 760. Cf. 386 U. S., at 645-646. It defies reality to deny that the union's principal dispute was with Hudik, the immediate employer of its members. It was Hudik which had acceded to the union's demand for the work-preservation clause particularly desired by its employees for their own protection. And it was Hudik which breached that clause. Nothing whatever in the record even remotely suggests that the union had any quarrel with Slant/Fin or Austin. Those companies were simply the vehicles used by Hudik to effect the breach which created the primary dispute between it and its own employees and their union. Nor is there the slightest basis for a suggestion that the true purpose of the work-preservation clause or the pressure applied to enforce it was to benefit employees "other than the boycotting employees or other employees of [Hudik]." *Id.,* at 645. Rather, the Board found that the purpose of the job action was "preserving work [the boycotting employees] had traditionally performed" for Hudik.[2] Since the purpose of the union's pressure was, by the Board's own finding, work preservation, and since *National Woodwork* holds that work preservation is a legitimate primary objective, the only possible conclusion on this record is that the pressure here was primary, and not prohibited by § 8 (b)(4)(B).

Nor is *National Woodwork* distinguishable, as contended, because Austin, and not Hudik, had the "right to control" the assignment of the work of cutting and threading the internal piping. Any conclusion from this that the union's pressure must have been directed at Austin and not Hudik is totally inconsistent with the premises and conclusion of *National Woodwork*.[3] First, Hudik was by no means a "neutral"

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[2] The Court argues, contrary to this finding, that the union's object was "to acquire work that it never had," because unit members had never done "the piping work on units specified by" a contractor who preferred prefabricated units. *Ante,* at 530 n. 16. The Board's finding that the union's aim was work preservation, rather than work acquisition, disposes of this argument. At any rate, striking workers in any work-preservation dispute have never before done the particular job at issue in the dispute, and are seeking to "acquire" work that has been assigned to other workers, but that is of a *type* that they have traditionally performed for their employer. As the majority correctly points out, *ante,* at 529 n. 16, the Court in *National Woodwork* had no occasion to decide what implications its analysis might have when a union seeks to acquire tasks not traditionally performed by its members, 386 U. S., at 630–631, and since this is not such a situation, I have no occasion to reach that question here.

[3] That *National Woodwork* required rejection of the "right to control" doctrine was quickly realized by the commentators.

"The modern primary-secondary analysis [of *National Woodwork*] requires the complete abandonment of the present 'right to control' rule. The unit has bargained for its rights and signed a contract with its employer, who happens to be a subcontractor. These two are without doubt the primary parties. The general contractor is removed from this direct confrontation, enters into the picture after the agreement has been made, receives his authority over job placement of the complaining unit in the sense contemplated by Congress as warranting or requiring protection. See 386 U. S., at 624–628. Hudik made the agreement with its employees to satisfy their deep concern for work preservation. But in defiance of its obligations voluntarily assumed, Hudik accepted a subcontract knowing that it disabled it from keeping the bargain. It completely escapes me how Hudik can be said to be the neutral, and Austin the target, on those facts, particularly in face of the Board's finding that the work-preservation clause was primary and not prohibited by § 8 (e). Thus had the union been forced to strike Hudik to get the agreement, the strike would clearly also have been primary and not prohibited by § 8 (b)(4)(B). How, then, could Hudik become a neutral by violating the clause after agreeing to it? The Board did not find that the union's insistence upon compliance with the legitimate work-preservation agreement was a pretext to apply pressure against Austin in some unrelated dispute; on the contrary, the Board found that the purpose of the job action, as well as of the original agreement, was work preservation. It is simply impossible to conclude that anyone but Hudik was the target of that pressure.

Second, it is not true that Hudik was a neutral because it was powerless to deal with the union demands. As the Court of Appeals pointed out, if the union's purpose is truly work preservation for the benefit of its own members, it presumably would be willing to negotiate some substitute for full compliance, such as premium pay, to replace the lost work.

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derivatively from the subcontractor, and is fully aware of the consequences of such work-preservation agreements. The effects upon the general contractor of any strike in this situation are thus ancillary to a primary dispute with the immediate employer vindicating bargaining unit concerns. This result is required if the right to strike is to be assured to the subcontractor's employees. . . . [T]he subcontractor is merely estopped from assigning to another party the rights he guaranteed to his own employees." Note, Secondary Boycotts and Work Preservation, 77 Yale L. J. 1401, 1416–1417 (1968). (Footnote omitted.)

Nothing in this record indicates that Hudik made any attempt to reach that or any other compromise solution, and there is no reason to think that the union would not have been satisfied with such a result.[4] Moreover, in the long run, only Hudik could deal with the union demands, for it alone could decide to comply with the collective-bargaining agreement in the future. The union could certainly have reasoned that after Hudik knowingly breached its contract—even if at that time Hudik had no power to undo the breach—union pressure was necessary to deter Hudik from repeating its breach of the work-preservation agreement in the future.

Third, there is no basis in the record for the conclusion that Austin should be regarded as the "real" target of the union's pressure. The union had no quarrel with Austin, as far as the record shows, except for the artificial one erected by today's unpersuasive reasoning based upon the subcontract to Hudik. There is no indication, for example, that the union represented any employees of Austin, or even that it was engaged in any general effort to prevent Austin from specifying installation of prefabricated climate-control units in all its projects. Further, nothing in the record suggests that the union's reaction would have been different had someone other than Austin made the decision to use prefabricated units; whether Hudik accomplished the wrong to its employees by contracting with Austin, or simply by independently ordering prefabricated units, could make no difference to the injured employees. Either way, their objective, as the Board found, was work preservation, and their grievance was with Hudik, and no one else.

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[4] The Court purports to fail to see "[h]ow this observation impugns the Board's finding with respect to the union's object." *Ante*, at 531. That "finding" is based exclusively on the inference that because only Austin could satisfy the union's demands, Austin must have been the real target of the union pressure. But since there were means by which Hudik could have satisfied the union's protest, and it did not attempt to take advantage of them, the premise of the Board's argument falls. Cf. *Local 742, United Brotherhood of Carpenters* v. *NLRB*, 174 U. S. App. D. C. 456, 467, 468, 533 F. 2d 683, 694–695 (1976), cert. pending, No. 75-1706.

The Court is wholly in error in treating the case as one of a factual finding by the Board—to be treated with deference by us—that Austin was the target of the union's pressure. The facts are not in dispute. The Board found that the reason for the union's refusal to install the prefabricated units was work preservation, but nevertheless concluded that this refusal was prohibited secondary pressure because Austin, not Hudik, had the "right to control" the disputed work, and because the union notified Austin, as well as Hudik, of its actions. "Right to control" may, in some circumstances, be relevant to the "inquiry into whether, under all the surrounding circumstances, the [u]nion's objective was preservation of work for [the pressured employer's] employees, or whether the [union pressure was] tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, 386 U. S., at 644. But once the Board determined that the union's object was preservation of work its members had traditionally performed for Hudik, its factfinding task was completed. The Board concluded that despite this finding, Austin's "right to control" the disputed work required the conclusion that Austin was the union's target. This was an error of law, not a factual finding.[5]

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[5] It is true that a possible result of successful work-preservation pressure by the union might be "forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin." 204 N. L. R. B., at 760. But the same was true in *National Woodwork*. There, had the union succeeded in enforcing its work-preservation agreement, the contractor would likely have terminated its contract with the manufacturer of precut and prefitted doors. Such secondary effects are common in labor disputes, but do not compel the conclusion that they were the real object of the union, particularly where, as here, alternative outcomes might also have satisfied the union. See *supra*, at 538–539, and n. 4.

## IV

The Court maintains that the collective-bargaining agreement between Enterprise and Hudik is irrelevant to the determination of whether the union exerted primary or secondary pressure, relying on *Carpenters* v. *NLRB*, 357 U. S. 93 (1958) (*Sand Door*). With all respect, this totally misapprehends the relevance of the agreement to the issue before us, and misapplies *Sand Door*.

In *Sand Door*, the union ordered its members not to handle doors ordered by their employer from a nonunion manufacturer. The manufacturer charged secondary pressure aimed at it, and the union defended on the ground that the strike was its response to the employer-contractor's breach of a provision in their collective-bargaining agreement that "workmen shall not be required to handle non-union material," and therefore primary pressure. The Court held that, although the collective-bargaining provision was not illegal,[6] pressure to enforce it was prohibited secondary pressure.[7]

Thus, *Sand Door* holds that pressure to enforce a *secondary* boycott clause remains secondary, despite the then legality of the clause itself; it is not authority that union pressure to enforce a concededly *primary* work-preservation clause (which, since the enactment of § 8 (e), is legal only because it is primary), is anything but primary pressure.[8] The union here

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[6] Such "hot cargo" clauses, then legal, are now prohibited by § 8 (e). See n. 1, *supra*.

[7] *Sand Door* is entirely consistent with *National Woodwork*, for the object of the pressure on the employer-contractor in *Sand Door* was "to satisfy union objectives elsewhere," specifically, to change the labor policy of the manufacturer.

[8] As one commentator pointed out more than 10 years ago:

"Of course *Sand Door* holds that a valid contract is not a defense to a secondary boycott. But it would be a serious misreading of that case, and indeed of the entire statutory evolution, to apply that notion in the context of [work-preservation agreements]. Prior to 1959, a contract does not argue, as in *Sand Door,* that pressure otherwise secondary is magically transformed into primary pressure by an employer's prior agreement to support a secondary boycott. Rather, §§ 8 (b)(4) and 8 (e) are "to be taken *pari passu,*" *National Woodwork, supra,* at 649 (Harlan, J., concurring), so that pressure to enforce an employer to honor a clause of a collective-bargaining agreement admittedly primary, because intended to preserve work traditionally performed by unit members, is also primary.[9] In short, the agreement in this case, as the Board found, was for a primary purpose; pressure brought to compel Hudik to agree to it would have been primary; and pressure brought to enforce it when Hudik breached it, whether by ordering prefabricated units himself, as in *National Woodwork,* or by entering a contract that required it to breach it, was no less primary.

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was lawful whether primary or secondary; *Sand Door* spoke only to the effect of the latter type of agreement on section 8 (b)(4). Section 8 (e) now generally prohibits the mere execution of such agreements. But if a contract is 'primary'—i. e., not within section 8 (e) at all—it is equally primary to enforce it by economic pressure on the contracting employer." Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8 (b)(4) and 8 (e), 113 U. Pa. L. Rev. 1000, 1040 (1965). (Footnotes omitted.)

[9] Thus, while it is true that "a valid contract is not a defense to a secondary boycott," Lesnick, *supra,* n. 8, the Court of Appeals was correct that "an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do *to benefit those employees* can [n]ever be considered a neutral bystander in a dispute not his own." 172 U. S. App. D. C., at 243, 521 F. 2d, at 903. (Emphasis added.) Of course, this statement presumes that enforcement of the work-preservation agreement is the true object of the union pressure, as the Board found was the case here, and not a mere pretext. If it were found, for example, that the union only enforced the agreement against prefabricated products manufactured by nonunion companies, and not against others, the object of the pressure would not be primary (enforcing the work-preservation agreement), but secondary (influencing the labor policy of the manufacturer). Cf. *National Woodwork,* 386 U. S., at 646.

## V*

Technological change has threatened the stability of jobs in a number of industries. Workers in those industries are understandably concerned about the possibility that new technological advances or increased reliance on prefabricated materials will render their skills superfluous, and eliminate their jobs, and have sought reassurance against those fears from their employers through collective bargaining. It might be argued that in the long run the national interest is better served by permitting technological change to proceed at its own pace, unhampered by the demands of labor, and that the problems of workers threatened with unemployment by such "progress" can be better dealt with by some other method than collective bargaining. But it is for Congress, not the Court, to decide how this problem is best solved. *National Woodwork,* 386 U. S., at 644; *id.,* at 649–650 (Harlan, J., concurring). And the Court has consistently recognized that the national labor policy adopted by Congress is for "management and labor voluntarily to negotiate for solutions to these significant and difficult problems." *Id.,* at 640. See also *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203 (1964). Today's decision undermines this policy by permitting an employer which has voluntarily agreed to a work-preservation clause to subvert that agreement by "assigning to another party the rights [it] guaranteed to [its] own employees." Note, Secondary Boycotts and Work Preservation, 77 Yale L. J. 1401, 1417 (1968). This is surely a serious setback for national labor policy, and hardly conducive to labor peace.

MR. JUSTICE STEWART, dissenting.

I disagreed with the Court in *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 650. Until that decision is overruled, however, it stands as an authoritative construction of § 8 (b)(4)(B) of the National Labor Relations Act. For the reasons stated in MR. JUSTICE BRENNAN's dissenting opinion, I agree that the Court's decision today is "patently precluded" by the *National Woodwork* case. On that basis I join all but Part V of MR. JUSTICE BRENNAN's dissenting opinion.

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*MR. JUSTICE STEWART does not concur in this Part.

# WEATHERFORD, AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, ET AL. *v.* BURSEY

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1510. Argued December 7, 1976—Decided February 22, 1977

Respondent and petitioner Weatherford (hereinafter petitioner), an undercover agent, were arrested for a state criminal offense, each thereafter retaining separate counsel. Petitioner had two pretrial meetings with respondent and respondent's counsel, who had sought petitioner's presence for the purpose of securing information or suggestions as to respondent's defense. Petitioner had no discussions concerning respondent's trial strategy or the pending criminal action either with his superiors or with the prosecution. Petitioner (who had told respondent he would not be a prosecution witness) testified for the prosecution, which on the morning of the trial decided to call petitioner as a witness because he had been seen in the company of police officers and had thus lost effectiveness as an undercover agent. Respondent was convicted. After he had served his sentence, he brought this action against petitioner under 42 U. S. C. § 1983, alleging that petitioner's participation in the two meetings had deprived respondent of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments as well as his right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. The District Court found for petitioner. The Court of Appeals, without disturbing the District Court's factual findings, reversed, concluding that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial," and that the concealment of petitioner's undercover status lulled respondent into a false sense of security, interfering with his trial preparations and denying him due process of law under *Brady* v. *Maryland,* 373 U. S. 83. *Held:*

1. Respondent was not deprived of his right to counsel under the Sixth Amendment, which does not establish a *per se* rule forbidding an undercover agent to meet with a defendant's counsel. *Black* v. *United States,* 385 U. S. 26; *O'Brien* v. *United States,* 386 U. S. 345; *Hoffa* v. *United States,* 385 U. S. 293, distinguished. Pp. 550-559.

(a) As long as the information possessed by petitioner about the two meetings remained uncommunicated, he posed no threat to respondent's Sixth Amendment rights. Pp. 554–557.

(b) Petitioner went to the meetings, not to spy, but because he was asked by respondent and his counsel and because the State was interested in maintaining petitioner's status as an informant and not arousing respondent's suspicions. Adoption of the Court of Appeals' *per se* rule would for all practical purposes have required petitioner to unmask himself. Pp. 557–558.

2. The Due Process Clause does not require that the prosecution must reveal before trial the names of undercover agents or other witnesses who will testify unfavorably to the defense. Pp. 559–561.

(a) There is no constitutional right to discovery in a criminal case, and *Brady, supra,* did not create one. P. 559.

(b) That petitioner not only concealed his identity but represented that he would not be a prosecution witness did not deny respondent a right to a fair trial. The misrepresentation was not deliberate, and there is no constitutional difference between the surprise testimony of an informer who is not suspected and therefore is not asked about testifying for the prosecution and the informer who, like petitioner, is asked by the defendant but denies that he will testify. P. 560.

(c) Though the Court of Appeals also suggested that petitioner's continued duplicity denied respondent the opportunity to plea bargain, there is no constitutional right to plea bargain. Pp. 560–561.

528 F. 2d 483, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 561.

*J. C. Coleman,* Deputy Attorney General of South Carolina, argued the cause for petitioners. With him on the brief were *Daniel R. McLeod,* Attorney General, and *A. Camden Lewis* and *John L. Choate,* Assistant Attorneys General.

*Laughlin McDonald* argued the cause for respondent. With him on the brief were *Neil Bradley, Herbert E. Buhl III, Ray P. McClain, Melvin L. Wulf,* and *John H. F. Shattuck.*

*Deputy Solicitor General Frey* argued the cause for the

United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh,* and *Marc Philip Richman.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether in the circumstances present in this case the conduct of an undercover agent for a state law enforcement agency deprived respondent Bursey of his right to the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution or deprived him of due process of law in violation of the Fourteenth Amendment.

## I

This case began when respondent Bursey filed suit under 42 U. S. C. § 1983 against petitioners Weatherford and Strom, respectively an undercover agent for and the head of the South Carolina State Law Enforcement Division, asserting that the defendants had deprived him of certain constitutional rights. The case was tried without a jury. The following facts are taken from the District Court's findings, which were not disturbed by the Court of Appeals.

During the early morning hours of March 20, 1970, Bursey and Weatherford, along with two others, vandalized the offices of the Richland County Selective Service in Columbia, S. C. Police were advised of the incident by Weatherford, who, in order to maintain his undercover status and his capability of working on other current matters in that capacity, was arrested and charged along with Bursey. Weatherford was immediately released on bond and, continuing the masquerade, retained an attorney, Frank Taylor, Sr. Bursey, who was later released on bond, retained his own counsel, C. Rauch Wise.

On two occasions thereafter and prior to trial, Weatherford met with Bursey and Wise, and the approaching trial was discussed. With respect to these meetings, the District Court found as follows:

> "On neither of these occasions did the defendant Weatherford seek information from the plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by the plaintiff and plaintiff's attorney in an effort to obtain information, ideas or suggestions as to the plaintiff's defense. From the beginning Weatherford advised plaintiff and plaintiff's attorney that Weatherford would obtain a severance of his case from that of the plaintiff. This severance was to be upon the ground that Weatherford might be prejudiced in going to trial with Bursey as a codefendant, because of Bursey's reputation and participation in other activities which had been covered by the news media. On no occasion did Bursey or his attorney question the granting of a severance, nor did they seem to concern themselves with whether the prosecutor would consent to a severance, although such consent is quite unusual where codefendants are charged with the same crime and proof will be from the same witnesses based upon identical facts. At those meetings between plaintiff, plaintiff's attorney and defendant Weatherford the plaintiff and his attorney raised the question of a possible informer being used to prove the case, but they never asked Weatherford if he were an informer and he never specifically denied being an informer, since he was never asked or accused." App. 248–249.

At no time did Weatherford discuss with or pass on to his superiors or to the prosecuting attorney or any of the attorney's staff "any details or information regarding the plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff." *Id.,* at 249. Until the day of trial the prosecuting attorney did not plan to use Weatherford as a witness. Consequently, until then, Weatherford had not expected to be a witness and had anticipated continuing his undercover work. However, Weatherford had lost some of his effectiveness as an agent in the weeks preceding trial because he had been seen in the company of police officers, and he was called for the prosecution. He testified as to his undercover activities and gave an eyewitness account of the events of March 20, 1970. Bursey took the stand, was convicted, and then disappeared until apprehended some two years later, at which time he was incarcerated and forced to serve his 18-month sentence.

Bursey then began this § 1983 action, alleging that Weatherford had communicated to his superiors and prosecuting officials the defense strategies and plans which he had learned at his meetings with Bursey and Wise, thereby depriving Bursey of the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments as well as of his right to a fair trial guaranteed him by the Due Process Clause of the Fourteenth Amendment. The District Court found for the defendants in all respects and entered judgment accordingly.

The Court of Appeals for the Fourth Circuit reversed, 528 F. 2d 483 (1975), concluding that "on the facts as found by the district court Bursey's rights to effective assistance of counsel and a fair trial were violated." *Id.*, at 486. The Court of Appeals held that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Ibid.* That the intrusion occurred in order to prevent revealing Weatherford's identity as an undercover agent was immaterial. The Court of Appeals thought that Weatherford was himself "a member of the prosecution," *id.*, at 487, and that therefore it was also immaterial that he had not informed other officials about what was said or done in the two meetings with Bursey and Wise.

In addition, the Court of Appeals concluded that Bursey had been denied due process of law under *Brady* v. *Maryland,* 373 U. S. 83 (1963), by concealment of Weatherford's identity until the day of trial and by Weatherford's statement that he would not be a witness, all of which lulled Bursey into a false sense of security and interfered with his preparations for trial. The judgment of the District Court was reversed, but the remand for further proceedings would have allowed Weatherford and Strom to present a qualified immunity defense under *Wood* v. *Strickland,* 420 U. S. 308 (1975).

We granted the petition for certiorari filed by Weatherford and Strom, who are represented by the State Attorney General. 426 U. S. 946 (1976). We reverse.

## II

The exact contours of the Court of Appeals' *per se* right-to-counsel rule are difficult to discern; but as the Court of Appeals applied the rule in this case, it would appear that if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent's revealing his identity, a violation of the defendant's constitutional rights has occurred, whatever was the purpose of the agent in attending the meeting, whether or not he reported on the meeting to his superiors, and whether or not any specific prejudice to the defendant's preparation for or conduct of the trial is demonstrated or otherwise threatened. The Court of Appeals was of the view, 528 F. 2d, at 486, that this Court "establish[ed] such a per se rule" in *Black* v. *United States,* 385 U. S. 26 (1966), and *O'Brien* v. *United States,* 386 U. S. 345 (1967). The Court of Appeals also relied on *Hoffa* v. *United States,* 385 U. S. 293 (1966).

We cannot agree that these cases, individually or together, either require or suggest the rule announced by the Court of Appeals and now urged by Bursey. Both *Black* and *O'Brien* involved surreptitious electronic surveillance by the Government, which was discovered after trial and conviction and which was plainly illegal under the Fourth Amendment.[1] In each case, some, but not all, of the conversations overheard were between the criminal defendant and his counsel during trial preparation. The conviction in each case was set aside and a new trial ordered. The explanatory *per curiam* in *Black,* although referring to the overheard conversations with counsel, did not rule that whenever conversations with counsel are overheard the Sixth Amendment is violated and a new trial must be had. Indeed, neither the Sixth Amendment nor the right to counsel was even mentioned in the short opinion. The Solicitor General conceded that Black was entitled to a "judicial determination" of whether "the monitoring of conversations between [Black] and his attorney had [any] *effect* upon his conviction or the fairness of his trial," although the Solicitor General contended that information derived from the overheard conversations was not used in any way by the prosecution. Memorandum for United States in *Black* v. *United States,* O. T. 1965, No. 1029, p. 4 (emphasis added). The Court focused on the particular form the "judicial determination" should take, concluding that on the particular facts of the case a new trial was the more appropriate means of affording Black "an opportunity to protect himself from the *use* of evidence that might be otherwise inadmissible." 385 U. S., at 29 (emphasis added). In *O'Brien,* the Court wrote nothing further, merely citing the *Black per curiam.* Once again the Solicitor General did not oppose further judicial proceedings to determine whether any information from the surveillance had been used at trial, notwithstanding his assertion that the contents of the overheard conversations were never communicated to the prosecuting attorneys. Brief for United States in *O'Brien* v. *United States,* O. T. 1966, No. 823, pp. 10–12.

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[1] In *Silverman* v. *United States,* 365 U. S. 505 (1961), the Court had held that eavesdropping accomplished through use of an electronic listening device similar to the "tubular microphone" used to overhear Black's and O'Brien's conversations constituted an unauthorized physical penetration of the petitioners' premises in violation of the Fourth Amendment. The Solicitor General conceded that both Black and O'Brien should have been allowed to establish that the prosecution's case was tainted by the interception of conversations between Black and persons other than their attorneys as well as by conversations involving counsel, thus indicating his awareness of the illegality of the Government's eavesdropping under the Fourth Amendment.

It is difficult to believe that the Court in *Black* and *O'Brien* was evolving a definitive construction of the Sixth Amendment without identifying the Amendment it was interpreting, especially in view of the well-established Fourth Amendment grounds for excluding the fruits of the illegal surveillance.[2] If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the *per se* rule announced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant. Here, the courts below have already conducted the "judicial determination," lacking in *Black* and *O'Brien,* of the effect of the overheard conversations on the defendant's conviction, and there is nothing in their findings or in the record to indicate any "use of evidence that might be otherwise inadmissible."

Neither does the Court's decision in *Hoffa* v. *United States, supra,* support the proposition urged by respondent. There, an informant sat in on conversations that defendant Hoffa had with his lawyers and with others during the course of Hoffa's trial on a charge of violating the Taft-Hartley Act. The jury at that trial hung. Hoffa was then tried for tampering with that jury. The informer testified at the latter trial with respect to conversations he had overheard in Hoffa's hotel suite during the prior trial, not including, however, the conversations Hoffa had with counsel. The Court sustained Hoffa's jury-tampering conviction over his claim, among others, that his Sixth Amendment counsel right had been violated.

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[2] See n. 1, *supra.*

In doing so, the Court did not hold that the Sixth Amendment right to counsel subsumes a right to be free from intrusion by informers into counsel-client consultations. Nor did it purport to describe the contours of any such right. The Court merely *assumed,* without deciding, that two cases in the Court of Appeals for the District of Columbia Circuit dealing with the right to counsel, *Caldwell* v. *United States,* 92 U. S. App. D. C. 355, 205 F. 2d 879 (1953), and *Coplon* v. *United States,* 89 U. S. App. D. C. 103, 191 F. 2d 749 (1951), were correctly decided; [3] *assumed* without deciding, that had Hoffa been convicted at his first trial, the conviction would have been set aside because the informer had overheard Hoffa and his lawyers conversing and had reported to the authorities the substance of at least some of those conversations; and then held that Hoffa's *assumed* Sixth Amendment rights had not been violated because the informer's testimony at the jury-tampering trial did not touch upon the overheard conversations with counsel but dealt only with conversations between Hoffa and third parties when his lawyers were not present. 385 U. S., at 307–308. Neither *Black*, *O'Brien*, *Hoffa*, nor any other case in this Court to which we have been cited furnishes grounds for the interpretation and application of the Sixth and Fourteenth Amendments appearing in the Court of Appeals' opinion and judgment.

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[3] *Coplon* held that interceptions by Government agents of telephone messages between the defendant and her lawyer before and during trial, if proved by the defendant, deprived her of her right to counsel and entitled her to a new trial. *Caldwell* held that the defendant's right to counsel was violated where a Government undercover agent went to work as an assistant for the defense and reported frequently to the prosecution on "many matters connected with the impending trial." 92 U. S. App. D. C., at 356, 205 F. 2d, at 880 (footnote omitted).

At the same time, we need not agree with petitioners that whenever a defendant converses with his counsel in the presence of a third party thought to be a confederate and ally, the defendant assumes the risk and cannot complain if the third party turns out to be an informer for the government who has reported on the conversations to the prosecution and who testifies about them at the defendant's trial. Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.[4]

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[4] In *Hoffa*, the United States conceded, as it does here as *amicus curiae*, that the Sixth Amendment would be violated "if the government places an informant in the defense camp during a criminal trial and receives from that informant privileged information pertaining to the defense of the criminal charges . . . because the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding." Brief for United States in *Hoffa* v. *United States*, O. T. 1966, No. 32, p. 71, quoted in Brief for United States as *Amicus Curiae* in the instant case, p. 24 n. 13.

Respondent argues that *Hoffa* established the same right-to-counsel standard for government interception of attorney-client communications by an undercover agent as for interception by electronic surveillance. Even apart from the fact that the Court was merely assuming the existence of a right-to-counsel violation in that case, see *supra*, at 553, we find respondent's argument questionable. One threat to the effective assist-

None of these elements is present here, however. Weatherford's testimony for the prosecution about the events of March and April 1970 revealed nothing said or done at the meetings between Bursey and Wise that he attended.[5] None of the State's evidence was obtained as a consequence of Weatherford's participation in those meetings. Nevertheless, it

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ance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard. However, a fear that some third party may turn out to be a government agent will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping, because the former intrusion may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings. Of course, in some circumstances the ability to exclude third parties from defense meetings may not eliminate the chilling effect on attorney-client exchanges, but neither *Hoffa* nor any other decision of this Court supports respondent's theory that the chill is the same whether induced by electronic surveillance or by undercover agents. Cf. *Fisher* v. *United States*, 425 U. S. 391, 402–405 (1976) (attorney-client privilege protects only those disclosures which might not have been made absent the privilege, because the purpose of the privilege is to encourage confidential disclosures by a client to an attorney); 8 J. Wigmore, Evidence § 2311, pp. 601–602 (McNaughton rev. ed. 1961) (attorney-client communications in the presence of a third party not the agent of either are generally not protected by the privilege).

[5] See App. 225–240 (testimony of Weatherford at state trial). On cross-examination by Wise (Bursey's lawyer), Weatherford acknowledged that at the second meeting with Bursey and Wise, Weatherford told Wise, in response to the latter's questions, that he had not been asked to testify for the prosecution and that he did not anticipate being present at Bursey's trial. This testimony, elicited by defense counsel apparently for the purpose of discrediting Weatherford's testimony on direct examination, obviously does not constitute use by the prosecution of information obtained from Weatherford's attendance at defense meetings. Whatever the limitations on testimony by informants about statements made at defense meetings attended by them, the Sixth Amendment does not prevent the defense from introducing such statements to undercut the effectiveness of the informant's testimony for the prosecution.

might be argued that Weatherford, a dutiful agent, surely communicated to the prosecutors Bursey's defense plans and strategy and his attorney's efforts to prepare for trial, all of which was inherently detrimental to Bursey, unfairly advantaged the prosecution, and threatened to subvert the adversary system of criminal justice.

The argument founders on the District Court's express finding that Weatherford communicated nothing at all to his superiors or to the prosecution about Bursey's trial plans or about the upcoming trial. App. 249, 252. The Court of Appeals did not disturb this finding, but sought to surmount it by declaring Weatherford himself to have been a member of the prosecuting team whose knowledge of Bursey's trial plans was alone enough to violate Bursey's constitutional right to counsel and to vitiate Bursey's conviction. 528 F. 2d, at 487. Though imaginative, this reasoning is not a realistic assessment of the relationship of Weatherford to the prosecuting staff or of the potential for detriment to Bursey or benefit to the State that Weatherford's uncommunicated knowledge might pose. If the fact was, as found by the District Court, that Weatherford communicated nothing about the two meetings to anyone else, we are quite unconvinced that a constitutional claim under the Sixth and Fourteenth Amendments was made out.

This is consistent with the Court's approach in the *Hoffa* case. There, the informant overheard several conversations between Hoffa and his attorneys, but the Court found it necessary to deal with the Sixth Amendment right-to-counsel claim only after noting that the informant had reported to the Government about at least some of the activities of Hoffa's defense counsel. 385 U. S., at 305–306. As long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey's Sixth Amendment rights. Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case.

Moreover, this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly. Weatherford, the District Court found, did not intrude at all; he was invited to the meeting, apparently not for his benefit but for the benefit of Bursey and his lawyer. App. 248. Weatherford went, not to spy, but because he was asked and because the State was interested in retaining his undercover services on other matters and it was therefore necessary to avoid raising the suspicion that he was in fact the informant whose existence Bursey and Wise already suspected.

That the *per se* rule adopted by the Court of Appeals would operate prophylactically and effectively is very likely true; but it would require the informant to refuse to participate in attorney-client meetings, even though invited, and thus for all practical purposes to unmask himself. Our cases, however, have recognized the unfortunate necessity of undercover work and the value it often is to effective law enforcement. *E. g., United States* v. *Russell,* 411 U. S. 423, 432 (1973); *Lewis* v. *United States,* 385 U. S. 206, 208–209 (1966). We have also recognized the desirability and legality of continued secrecy even after arrest. *Roviaro* v. *United States,* 353 U. S. 53, 59, 62 (1957). We have no general oversight authority with respect to state police investigations. We may disapprove an investigatory practice only if it violates the Constitution; and judged in this light, the Court of Appeals' *per se* rule cuts much too broadly. If, for example, Weatherford at Bursey's invitation had attended a meeting between Bursey and Wise but Wise had become suspicious and the conversation was confined to the weather or other harmless subjects, the Court of Appeals' rule, literally read, would cloud Bursey's subsequent conviction, although there would have been no constitutional violation. The same would have been true if Wise had merely asked whether Weatherford was an informant, Weatherford had denied it, and the meeting then had ended; likewise if the entire conversation had consisted of Wise's questions and Weatherford's answers about Weatherford's own defense plans. Also, and more cogently for present purposes, unless Weatherford communicated the substance of the Bursey-Wise conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to the State, there can be no Sixth Amendment violation. Yet under the Court of Appeals' rule, Bursey's conviction would have been set aside on appeal.

There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment insofar as it is applicable to the States by virtue of the Fourteenth Amendment. The proof in this case thus fell short of making out a § 1983 claim, and the judgment of the District Court should have been affirmed in this respect.

It is also apparent that neither Weatherford's trial testimony nor the fact of his testifying added anything to the Sixth Amendment claim. Weatherford's testimony for the prosecution related only to events prior to the meetings with Wise and Bursey and referred to nothing that was said at those meetings. There is no indication that any of this testimony was prompted by or was the product of those meetings. Weatherford's testimony was surely very damaging, but the mere fact that he had met with Bursey and his lawyer prior to trial did not violate Bursey's right to counsel any more than the informant's meetings with Hoffa and Hoffa's lawyers rendered inadmissible the informant's testimony having no connection with those conversations.

## III

Because under *Brady* v. *Maryland,* 373 U. S. 83 (1963), the prosecution has the "duty under the due process clause to insure that 'criminal trials are fair' by disclosing evidence favorable to the defendant upon request," the Court of Appeals also held that the State was constitutionally forbidden to "conceal the identity of an informant from a defendant during his trial preparation," to permit the informant to "deny up through the day before his appearance at trial that he will testify against the defendant," and then to have the informant "testify with devastating effect." 528 F. 2d, at 487. This conduct, the Court of Appeals thought, lulled the defendant into a false sense of security and denied him "the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross-examination, and (3) to attempt to counter the devastating impact of eyewitness identification." *Ibid.* The Court of Appeals apparently would have arrived at this conclusion whether or not Weatherford had ever met with Wise.

Again we are in disagreement. *Brady* does not warrant the Court of Appeals' holding. It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . ." *Wardius* v. *Oregon,* 412 U. S. 470, 474 (1973). *Brady* is not implicated here where the only claim is that the State should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial.

In terms of the defendant's right to a fair trial, the situation is not changed materially by the additional element relied upon by the Court of Appeals, namely, that Weatherford not only concealed his identity but represented he would not be a witness for the prosecution, an assertion that proved to be inaccurate. There are several answers to the contention that the claim of misrepresentation is of crucial importance. The first is that there was no deliberate misrepresentation in this regard: The trial court found that until the day of trial Weatherford did not expect to be called as a witness; until then he did not know that he would testify. Second, as we understand the argument, it is that once the undercover agent has successfully caused an arrest, he risks causing an unfair trial if he denies his identity when accused or asked. We would hesitate so to construe the Due Process Clause. We are not at all convinced that there is a constitutional difference between the situation where the informant is sufficiently trusted that he is never suspected and never asked about the possibility of his testifying but nevertheless surprises the defendant by giving devastating testimony, and the situation we have here, where the defendant is suspicious enough to ask and the informant denies that he will testify but nevertheless does so. Moreover, if the informant must confess his identity when confronted by an arrested defendant, in many cases the agent in order to protect himself will simply disappear pending trial, before the confrontation occurs. In the last analysis, however, the undercover agent who stays in place and continues his deception merely retains the capacity to surprise; and unless the surprise witness or unexpected evidence is, without more, a denial of constitutional rights, Bursey was not denied a fair trial.

The Court of Appeals suggested that Weatherford's continued duplicity lost Bursey the opportunity to plea bargain.

But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty. Moreover, Wise could have approached the prosecutor before trial and surely was under no misapprehension about Bursey's plight during trial. It was also suggested by the Court of Appeals that Bursey was deprived of the opportunity to investigate Weatherford in preparation for possible impeachment on cross-examination. But there was no objection at trial to Weatherford's testimony, no request for a continuance, and even now no indication of substantial prejudice from this occurrence. As for Bursey's claimed disability to counter Weatherford's "devastating" testimony, the disadvantage was no more than exists in any case where the State presents very damaging evidence that was not anticipated. Wise and Bursey must have realized that in going to trial the State was confident of conviction and that if any exculpatory evidence or possible defenses existed it would be extremely wise to have them available. Prudence would have counseled at least as much.

The judgment of the Court of Appeals is

*Reversed.*[6]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

It is easy to minimize the significance of the incursion into the lawyer-client relationship that the Court sanctions today. After all, as the Court observes, there is no evidence that Weatherford went to the meetings between Bursey and his lawyer with an intent to spy; that he reported to the prosecutor on those meetings; or that what he learned was used to develop evidence against Bursey. But while what occurred here may be "the obnoxious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States,* 116 U. S. 616, 635 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications.

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[6] Because we hold that Bursey's constitutional rights were not violated by Weatherford's actions, we reverse the holding of the Court of Appeals that Weatherford's superior, Strom, was also liable because of his involvement in Weatherford's undercover activities.

There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications between defendants and their lawyers. First, the integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel. In *Wardius* v. *Oregon,* 412 U. S. 470 (1973), this Court made clear that while "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser." *Id.,* at 474. Due process requires that discovery "be a two-way street."

> "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.,* at 475–476.

At issue in *Wardius* was a statute compelling defendants to provide certain information about their case to the prosecution. But the same concerns are implicated when the State seeks such information, not by force of law, but by surreptitious invasions and deceit.

Of equal concern, governmental incursions into confidential lawyer-client communications threaten criminal defendants' right to the effective assistance of counsel. Only last Term we held that the right to counsel encompasses the right to confer with one's lawyer. *Geders* v. *United States,* 425 U. S. 80 (1976). See also *Reynolds* v. *Cochran,* 365 U. S. 525, 531 (1961); *Hawk* v. *Olson,* 326 U. S. 271, 278 (1945); *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940); *Powell* v. *Alabama,* 287 U. S. 45, 57 (1932). But "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States,* 425 U. S. 391, 403 (1976). See also *United States* v. *Nobles,* 422 U. S. 225, 238–239 (1975). For this reason, it has long been recognized that "the essence of the Sixth Amendment right is . . . privacy of communication with counsel." *United States* v. *Rosner,* 485 F. 2d 1213, 1224 (CA2 1973), cert. denied, 417 U. S. 950 (1974). See, *e. g., Caldwell* v. *United States,* 92 U. S. App. D. C. 355, 205 F. 2d 879 (1953); *Coplon* v. *United States,* 89 U. S. App. D. C. 103, 191 F. 2d 749 (1951); *Louie Yung* v. *Coleman,* 5 F. Supp. 702, 703 (Idaho 1934); cf., *e. g., In re Rider,* 50 Cal. App. 797, 195 P. 965 (1920); *Thomas* v. *Mills,* 117 Ohio St. 114, 157 N. E. 488 (1927); *State ex rel. Tucker* v. *Davis,* 9 Okla. Crim. 94, 130 P. 962 (1913); *Turner* v. *State,* 91 Tex. Crim. 627, 241 S. W. 162 (1922); Annot., 5 A. L. R. 3d 1360 (1966).

The Court today apparently concludes that neither of these constitutional values is infringed when, as here, the State does not act with a purpose to intercept information about the defense, and the information that is uncovered is neither transmitted to the prosecutor nor used by him to the defendant's detriment. I respectfully disagree. In my view, the "balance of forces between the accused and his accuser" is sharply skewed in favor of the accuser if the government's key witnesses are permitted to discover the defense strategy by intercepting attorney-client communications, even if the witnesses cannot divulge the information to the prosecution. With this information, the witnesses are in a position to formulate in advance answers to anticipated questions, and even to shade their testimony to meet expected defenses.[1] Furthermore, because of these dangers defendants may be deterred from exercising their right to communicate candidly with their lawyers if government witnesses can intrude upon the lawyer-client relationship with impunity so long as they do not discuss what they learn with the prosecutor.[2] And insofar as the Sixth Amendment establishes an independent right to confidential communications with a lawyer, that right by definition is invaded when a government agent attends meetings of the defense team at which defense plans are reviewed.[3]

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[1] If, for example, Weatherford had learned that Bursey would use an entrapment defense against whoever admitted to being a government agent, Weatherford could have planned his testimony so as to minimize his own role and emphasize Bursey's predisposition. Bursey, on the other hand, would have had little time to reconstruct in his mind Weatherford's role in the decision to commit the crime once Weatherford testified that he was the state agent. Cf. *United States* v. *Orman*, 417 F. Supp. 1126, 1137 (Colo. 1976).

[2] The Court suggests, *ante*, at 555 n. 4, that defendants can protect themselves against intrusions by third parties by excluding them from meetings at which defense strategy is discussed. But when, as here, the third party is an indicted codefendant, exclusion is not practicable; codefendants need to be informed of each other's strategy if only to determine whether joinder is prejudicial, cf. Fed. Rule Crim. Proc. 14. Indeed, because of the interdependence of codefendants, communications between a lawyer and his client generally remain privileged even when disclosed to a codefendant or his attorney. See The Attorney-Client Privilege in Multiple Party Situations, 8 Colum. J. Law & Soc. Problems 179 (1972).

[3] Of course, the fact that Weatherford did not reveal what he learned

But even if I were to agree that unintended and undisclosed interceptions by government witness-employees affect neither the fairness of trials nor the effectiveness of defense counsel, I still could not join in upholding the practice. For in my view, the precious constitutional rights at stake here, like other constitutional rights, need "breathing space to survive," *NAACP* v. *Button,* 371 U. S. 415, 433 (1963), and a prophylactic prohibition on all intrusions of this sort is therefore essential. A rule that offers defendants relief only when they can prove "intent" or "disclosure" is, I fear, little better than no rule at all. Establishing that a desire to intercept confidential communications was a factor in a State's decision to keep an agent under cover will seldom be possible, since the State always can argue plausibly that its sole purpose was to continue to enjoy the legitimate services of the undercover agent. . Proving that an informer reported to the prosecution on defense strategy will be equally difficult, not only because such proof requires an informer or prosecutor to admit his own wrongdoing (and open the door to damages suits and attacks on convictions), but also because an informer's failure to make a report after overhearing a lawyer-client session oftentimes can be an effective means of communicating to the prosecutor that nothing surprising was uncovered.[4] Given these problems of proof, the only way to assure that defendants will feel free to communicate candidly with their lawyers is to prohibit the government from intercepting such

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may be relevant to the amount of damages Bursey can recover, as the Court of Appeals acknowledged. 528 F. 2d 483, 487 (CA4 1975). No damages assessment has been made in this case, however, since the District Court found no liability.

[4] In this case, for example, the prosecutor might have assumed that Weatherford had been privy to Bursey's defense plans, and that Weatherford's acquiescence when told of the prosecutor's decision to use him as a witness meant that the defense did not suspect Weatherford or have any damaging information about him.

confidential communications, at least absent a compelling justification for doing so.[5]

Like the Court of Appeals, and unlike the majority today, I believe a *per se* rule of this sort is fully supported, if not compelled, by our decisions in *Black* v. *United States,* 385 U. S. 26 (1966), and *O'Brien* v. *United States,* 386 U. S. 345 (1967). In both cases, the United States informed this Court that lawyer-client conversations had been intercepted by surveillance devices installed to investigate crimes unrelated to the crimes for which the defendants were convicted. Memorandum for United States in *Black* v. *United States,* O. T. 1965, No. 1029, p. 2; Brief for United States in *O'Brien* v. *United States,* O. T. 1966, No. 823, pp. 10–11. In *Black* the Government reported that information uncovered through the monitoring had been relayed to the prosecutors, but maintained that none of the evidence against the defendant had been derived from the surveillance, and that nothing was learned "which had any effect upon the presentation of the government's case or the fairness of petitioner's trial." Memorandum for United States in *Black* v. *United States, supra,* at 4. In *O'Brien* the Government stated that the only intercepted lawyer-client conversation concerned the terms of the defendant's bail, and that neither this conversation nor any other conversation was disclosed to the prosecuting attorneys. Brief for United States in *O'Brien* v. *United States, supra,* at 11. In both cases, the United States urged a remand for a hearing to determine whether the intrusions had tainted the trials. Memorandum for United States in *Black* v. *United States, supra,* at 5; Brief for United States in *O'Brien* v. *United States, supra,* at 12. Yet in each case this Court rejected that course and instead remanded for a new trial. To say that these cases establish that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial," *ante,* at 552, twists the cases beyond recognition.[6] That is precisely the principle that was urged by the Government and by the dissenters, *Black* v. *United States, supra,* at 30–31 (Harlan, J., dissenting); *O'Brien* v. *United States, supra,* at 346–347 (Harlan, J., dissenting), but was rejected by the Court. By vacating the convictions *without* proof that "the overheard conversations have produced . . . any of the evidence offered at trial," *Black* and *O'Brien* establish that "any governmental activity of the kind here in question *automatically* vitiates . . . any conviction occurring during the span of such activity," *Black* v. *United States*, *supra*, at 31 (Harlan, J., dissenting), and precludes the use of tainted evidence at any retrial.

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[5] There is no evidence in this record that Weatherford's life would have been jeopardized or any ongoing investigations compromised had Weatherford given up his cover on March 20, 1970, after the crime was committed, rather than on July 27, 1970, after trial began. To the contrary, the fact that Weatherford felt no need for police protection after trial, App. 107, suggests that there was no danger at any time. And the Chief of the South Carolina State Law Enforcement Division conceded that Weatherford was not working on "anything particular" between the time of the crime and the time of the trial. *Id.,* at 125. Indeed the Chief admitted that he "wasn't concerned" about losing Weatherford's cover because after breaking the case "his identity is going to be known anyway." *Id.,* at 124. Thus the only legitimate justification the State had for arresting and indicting Weatherford, and for retaining a lawyer and manufacturing a story for him was to postpone for several months the date at which a new agent would have to be assigned again.

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[6] The Court's alternative suggestion, *ante,* at 551–552, that *Black* and *O'Brien* were actually Fourth Amendment cases is equally unpersuasive. The briefs in *Black,* while noting the Fourth Amendment issue, Memorandum for United States 4; Supplemental Memorandum for Petitioner 6, focused on the Sixth Amendment violation, Memorandum for United States 3–4; Supplemental Memorandum for Petitioner 7–20. The opinion does not mention either the Fourth or Sixth Amendment, but the narration of the facts makes clear that the Court's primary concern was the interception of lawyer-client conversations. 385 U. S., at 27–28. Moreover, during the same Term that *Black* and *O'Brien* were decided, the Court, in another electronic surveillance case, remanded for a taint hearing rather than for a new trial because, "[u]nlike the situations in *Black* . . . and *O'Brien* . . . there was apparently no direct intrusion here into attorney-client discussions." *Hoffa* v. *United States,* 387 U. S. 231, 233 (1967). See also *Wolff* v. *McDonnell,* 418 U. S. 539, 576 (1974) (WHITE, J.) (citing *Black* and *O'Brien* as Sixth Amendment cases); *Hoffa* v. *United States,* 385 U. S. 293, 307 (1966) (citing *Black* as Sixth Amendment case).

Rather than retreating from *Black* and *O'Brien*, I would reaffirm them and would affirm the judgment of the Court of Appeals.

# DON E. WILLIAMS CO. *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1312. Argued December 8, 1976—Decided February 22, 1977

Petitioner accrual-basis corporate taxpayer, by delivering fully secured promissory demand notes to the trustees of its qualified employees' profit-sharing trust, *held* not entitled to income tax deductions therefor under § 404 (a) of the Internal Revenue Code of 1954, which allows a deduction for contributions "paid" by an employer to a profit-sharing plan in the taxable year "when paid," and further allows the deduction if the contribution was a "payment . . . made" within a specified grace period following the end of the employer's taxable year. Pp. 574-583.

(a) The statutory terms "paid" and "payment," coupled with the grace period and the legislative history's reference to "paid" and "actually paid," demonstrate that, regardless of the method of accounting, all taxpayers must pay out cash or its equivalent by the end of the grace period in order to qualify for the § 404 (a) deduction. This accords with the apparent statutory policy that the profit-sharing plan receive full advantage of any contribution that entitles the employer to a tax benefit. Here the petitioner's issuance and delivery of the promissory notes did not make the accrued contributions ones that were "paid" within the meaning of § 404 (a). Pp. 574-579.

(b) Though the notes had value and would qualify as income to a seller-recipient, the notes, for the maker, even though fully secured, are still only a promise to pay and do not in themselves constitute an outlay of cash or other property. P. 579.

(c) The transactions in question cannot be treated as payments of cash to the trustees followed by loans, evidenced by the notes in return, since "a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred," *Commissioner* v. *National Alfalfa Dehydrating*, 417 U. S. 134, 148. Pp. 579-580.

(d) The word "paid" in § 404 (a) cannot be assumed to have the same meaning it has in § 267 (a) of the Code, which disallows deductions by an accrual-basis taxpayer for certain items that are accrued but not yet paid to *related cash-basis* payees. The situation under

§ 267 (a) whereby the term "paid" has been used to insure that transactions between related entities received consistent tax treatment, has no counterpart under § 404 (a), for the qualified profit-sharing plan is exempt from tax. Pp. 580–582.

(e) A promissory note cannot properly be equated with a check, since a note, even when payable on demand and fully secured, is still only a promise to pay, whereas a check is a direction to the bank for immediate payment, is a medium of exchange, and is treated for federal tax purposes as a conditional payment of cash. Pp. 582–583.

527 F. 2d 649, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring statement, *post*, p. 583. STEWART, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 583.

*Marvin L. Schrager* argued the cause for petitioner. With him on the briefs was *Durward J. Long, Sr.*

*Deputy Solicitor General Jones* argued the cause for respondent. On the brief were *Solicitor General Bork, Assistant Attorney General Crampton, Stuart A. Smith, Leonard J. Henzke, Jr.,* and *David English Carmack.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this federal income tax case is whether an accrual-basis corporate taxpayer, by delivering its fully secured promissory demand note to the trustees of its qualified employees' profit-sharing trust, is entitled to a deduction therefor under § 404 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 404 (a).[1]

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[1] Section 404 (a), as amended by § 24 of the Technical Amendments Act of 1958, 72 Stat. 1623, reads in pertinent part:

"(a) General rule.

"If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, . . . such contributions . . . shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income); but, if they satisfy the conditions of either of such sections, they

## I

The pertinent facts are stipulated. Petitioner, Don E. Williams Company (taxpayer), is an Illinois corporation with its principal office at Moline in that State. It serves as a manufacturers' representative and wholesaler for factory tools and supplies. It keeps its books and files its federal income tax returns on the accrual method of accounting and on the basis of the fiscal year ended April 30. Don E. Williams, Jr., president of the taxpayer, owns 87.08% of its outstanding capital stock; Joseph W. Phillips, Jr., vice president, owns 4.17% thereof; and Alice R. Williams, secretary-treasurer, owns 4.58%.

In November 1963, the taxpayer's directors adopted the Don E. Williams Company Profit Sharing Plan and Trust. The trustees are the three officers of the taxpayer and the First National Bank of Moline. The trust was "qualified" under § 401 (a) of the Code and thus, under § 501 (a), is exempt from federal income tax.

Near the end of each of its fiscal years 1967, 1968, and 1969, the taxpayer's directors authorized a contribution of approximately $30,000 to the trust. This amount was accrued as an expense and liability on the taxpayer's books at the close of the year. In May, the taxpayer delivered to the trustees its interest-bearing promissory demand note for the amount of the liability so accrued. The 1967 and 1968

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shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

. . . . .

"(3) Stock bonus and profit-sharing trusts.

"(A) Limits on deductible contributions.

"In the taxable year when paid, if the contributions are paid into a . . . profit-sharing trust, and if such taxable year ends within or with a taxable year of the trust with respect to which the trust is exempt under section 501 (a), in an amount not in excess of 15 percent of the compensation otherwise paid or accrued during the taxable year to all employees under the . . . profit-sharing plan. . . ."

notes bore 6% interest and the 1969 note bore 8% interest. Each note was guaranteed by the three officer-trustees individually and, in addition, was secured by collateral consisting of Mr. Williams' stock of the taxpayer and the interests of Mr. Williams and Mr. Phillips under the plan. The value of the collateral plus the net worth of Alice R. Williams, a guarantor, greatly exceeded the face amount of each note.

Within a year following the issuance of each note the taxpayer delivered to the trustees its check for the principal amount of the note plus interest. Each check was duly honored.

In its federal income tax return filed for each of the fiscal years 1967, 1968, and 1969 the taxpayer claimed a deduction under § 404 (a) for the liability accrued to the trustees. On audit, the Commissioner of Internal Revenue, respondent here, ruled that the accruals and the deliveries of the notes to the trustees were not contributions that were "paid," within the meaning of § 404 (a). Accordingly, he disallowed the claimed accrual deductions and, instead, allowed deductions only for the checks[2] for the respective fiscal years in which they were delivered. These adjustments resulted in deficiencies of $15,162.87, $1,360.64, and $530.42, respectively, in the taxpayer's income taxes for the three years.

On petition for redetermination, the United States Tax Court, in a reviewed opinion with three dissents, upheld the Commissioner. 62 T. C. 166 (1974). In so doing, it adhered to its consistent rulings since 1949[3] to the effect that an accrual-basis employer's contribution to its qualified employees' profit-sharing plan in the form of the employer's promissory note was not something "paid," and therefore deductible, under § 404 (a) of the 1954 Code or under the predecessor § 23 (p) of the Internal Revenue Code of 1939. With the taxpayer's case being subject to an appeal to the United States Court of Appeals for the Seventh Circuit, which had not yet ruled on the issue, the Tax Court declined to follow decisions of the Third, Ninth, and Tenth Circuits that had disagreed with the Tax Court in earlier cases.[4] 62 T. C., at 168.

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[2] Respondent acknowledges that a solvent taxpayer's issuance and delivery of a check is a contribution that is "paid," within the language of § 404 (a). Tr. of Oral Arg. 28–31. See *Dick Bros.* v. *Commissioner*, 205 F. 2d 64 (CA3 1953).

[3] *Logan Engineering Co.* v. *Commissioner*, 12 T. C. 860 (Kern, J., reviewed by the court with no dissents), appeal dismissed (CA7 1949); *Slaymaker Lock Co.* v. *Commissioner*, 18 T. C. 1001 (1952) (Bruce, J.), rev'd *sub nom. Sachs* v. *Commissioner*, 208 F. 2d 313 (CA3 1953); *Time Oil Co.* v. *Commissioner*, 26 T. C. 1061 (1956) (Withey, J.), remanded,

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258 F. 2d 237 (CA9 1958), supplemental opinion, 294 F. 2d 667 (1961); *Wasatch Chemical Co.* v. *Commissioner,* 37 T. C. 817 (1962) (Fay, J., reviewed by the court with no dissents), remanded, 313 F. 2d 843 (CA10 1963). Memorandum decisions to the same effect are *Freer Motor Transfer* v. *Commissioner,* 8 TCM 507 (1949), ¶ 49,124 P-H Memo TC (Kern, J.); *Sachs* v. *Commissioner,* 11 TCM 882 (1952), ¶ 52,256 P-H Memo TC (LeMire, J.), remanded, 208 F. 2d 313 (CA3 1953); *Lancer Clothing Corp.* v. *Commissioner,* 34 TCM 776 (1975), ¶ 75,180 P-H Memo TC (Scott, J.), on appeal to the Second Circuit, No. 76-4012; *Coastal Electric Corp.* v. *Commissioner,* 34 TCM 1007 (1975), ¶ 75,231 P-H Memo TC (Goffe, J.), on appeal to the Fourth Circuit, No. 75-2184. See Rev. Rul. 71-95, 1971-1 Cum. Bull. 130; Rev. Rul. 55-608, 1955-2 Cum. Bull. 546, 548. See also *Patmon, Young & Kirk* v. *Commissioner,* 536 F. 2d 142 (CA6 1976), concerning a cash basis taxpayer.

[4] *Sachs* v. *Commissioner,* 208 F. 2d 313 (CA3 1953) (negotiable interest-bearing demand notes); *Time Oil Co.* v. *Commissioner,* 258 F. 2d 237, 240 (CA9 1958) (non-interest-bearing demand notes, said to present a "close" question); *Wasatch Chemical Co.* v. *Commissioner,* 313 F. 2d 843 (CA10 1963) (unsecured interest-bearing five-year promissory notes). Accord, *Advance Constr. Co.* v. *United States,* 356 F. Supp. 1267 (ND Ill. 1972) (secured interest-bearing term promissory note).

The persistence of the Government in pursuing its position on an issue of tax law has been noted before. *United States* v. *Foster Lumber Co., ante,* at 54-55 (dissenting opinion). This time, however, the Government's position has been consistently accepted for more than 25 years by the Tax Court. It thus has not encountered uniform judicial rejection over a substantial period, as it had on the *Foster Lumber* issue.

On appeal, the Seventh Circuit also declined to follow its sister Circuits, and affirmed. 527 F. 2d 649 (1975). We granted certiorari to resolve the conflict. 426 U. S. 919 (1976).

## II

A. *The statute.* Under § 446 of the Code, 26 U. S. C. § 446, taxable income is computed under the accounting method regularly utilized by the taxpayer in keeping its books. Subject to that requirement, "a taxpayer may compute taxable income" under the cash receipts and disbursements method or, among others, under "an accrual method." As a consequence, the words "paid or accrued" or "paid or incurred" appear in many of the Code's deduction provisions.[5] The presence of these phrases reveals Congress' general intent to give full meaning to the accrual system and to allow the accrual-basis taxpayer to deduct appropriate items that accrue, or are incurred, but are unpaid during the taxable year.

Section 404 (a), however, quoted in n. 1, *supra,* stands in obvious contrast. It provides that "[i]f contributions are *paid* by an employer to . . . a . . . profit-sharing . . . plan," the contributions, subject to a specified limitation in amount, shall be deductible "[i]n the taxable year when *paid*" (emphasis supplied). The usual alternative words, "or accrued" or "or incurred," are missing, and their absence indicates congressional intent to permit deductions for profit-sharing plan contributions only to the extent they are actually paid and not merely accrued or incurred during the year. Congress, however, by way of addendum, provided a grace period for the accrual-basis taxpayer. Section 404 (a)(6) allowed a deduction for the taxable year with respect to a contribution on account of that year if it was a "payment . . . made" within the time prescribed for filing that year's return.[6] Under § 6072 (b) of the Code, this period, for petitioner-taxpayer, was two and one-half months after April 30, the close of its fiscal year, or July 15.

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[5] See, *e. g.,* §§ 162 (a), 163 (a), 164 (a), 174 (a)(1), 175 (a), 177 (a), 180 (a), 182 (a), 212, 216 (a), and 217 (a). See also § 7701 (a)(25).

B. *The legislative history.* This history, as is to be expected, is consistent with the theme of the statute's language. Section 404 is virtually identical with § 23 (p) of the 1939 Code, as amended by § 162 (b) of the Revenue Act of 1942, 56 Stat. 863. Committee reports at that time speak of an accrual-basis taxpayer's deferral of paying compensation and state that, if this was done "under an arrangement having the effect of a . . . profit-sharing . . . plan . . . deferring the receipt of compensation, he will not be allowed a deduction until the year in which the compensation is *paid*" (emphasis supplied). H. R. Rep. No. 2333, 77th Cong., 2d Sess., 106 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess., 141 (1942).[7] This, however, would have created a computational problem for the accrual-basis taxpayer who wished to make the maximum contribution possible under the percentage limitations of the statute, see § 404 (a)(3)(A), n. 1, *supra,* but who would not be able to determine that figure until after the close of the taxable year. See Hearings before the Senate Committee on Finance on the Revenue Act of 1942, 77th Cong., 2d Sess., 465 (1942). Accordingly, Congress provided the grace period, originally 60 days under § 23 (p)(1)(E) of the 1939 Code, as amended, 56 Stat. 865, for the accrual-basis taxpayer.

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[6] Section 404 (a) (6), as it read prior to a 1974 amendment, provided:

"(6) Taxpayers on accrual basis.

"For purposes of paragraphs (1), (2), and (3), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extension thereof)."

Section 1013 (c) (2) of the Employee Retirement Income Security Act of 1974, 88 Stat. 923, amended this section to afford the same grace period to a cash-basis taxpayer.

[7] At least one witness at the time aptly described the law as having been "drafted in such a way that all corporations are put on a cash basis on the payment to trusts." Statement of Richard D. Sturtevant in Hearings before the Senate Committee on Finance on the Revenue Act of 1942, 77th Cong., 2d Sess., 465 (1942).

Six years later the House Committee on Ways and Means recommended an extension of the grace time and referred to the then-existing 60-day period for the deduction of "contributions *actually paid*" (emphasis supplied). H. R. Rep. No. 2087, 80th Cong., 2d Sess., 13 (1948). The Senate did not then go along. But in 1954 the grace period was lengthened to coincide with the period for filing the return, § 404 (a)(6) of the 1954 Code, and at that time a similar reference, "actually makes payment," was repeated in the legislative history. S. Rep. No. 1622, 83d Cong., 2d Sess., 55 (1954). See, *id.*, at 292, and H. R. Rep. No. 1337, 83d Cong., 2d Sess., A151 (1954).

The applicable Treasury Regulations since 1942 consistently have stressed payment by the accrual-basis taxpayer. See Reg. 111, § 29.23 (p)-1 (1943); Reg. 118, § 39.23 (p)-1 (d) (1953); Reg. § 1.404 (a)-1 (c), 26 CFR § 1.404 (a)-1 (c) (1975).[8] With the statute re-enacted in the 1954 Code, this administrative construction may be said to have received congressional approval. See *Lykes* v. *United States,* 343 U. S. 118, 127 (1952).

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[8] Reg. § 1.404 (a)-1 (c) reads:

"Deductions under section 404 (a) are generally allowable only for the year in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his returns on the accrual method of accounting. Exceptions are made in the case of . . . and, as provided by section 404 (a)(6), in the case of payments made by a taxpayer on the accrual method of accounting not later than the time prescribed by law for filing the return for the taxable year of accrual (including extensions thereof). This latter provision is intended to permit a taxpayer on the accrual method to deduct such accrued contribution or compensation in the year of accrual, provided payment is actually made not later than the time prescribed by law for filing the return for the taxable year of accrual (including extensions thereof) . . . ."

We thus have, in the life and development of the statute, an unbroken pattern of emphasis on *payment* for the accrual-basis taxpayer. Indeed, the taxpayer here concedes that more than mere accrual is necessary for the accrual-basis taxpayer to be entitled to the deduction. Tr. of Oral Arg. 17. The taxpayer would find that requirement satisfied by the issuance and delivery of its promissory note. To that aspect of the case we now turn.

## III

In the light of the language of the statute, its legislative history, and the taxpayer's just-mentioned concession, the controversy before us obviously comes down to the question whether the taxpayer's issuance and delivery of its promissory note to the trustees within the grace period, unaccompanied, however, by discharge of the note within that period, made the accrued contribution one that was "paid" within the meaning of § 404 (a). The obligation to make the contribution for the taxable year existed, and the liability was even formally recognized by the taxpayer by the issuance and delivery of its note of acknowledged value. But was all this a contribution "paid" to the profit-sharing plan?

Two decisions of this Court, although they concern cash-basis taxpayers, are of helpful significance. The first is *Eckert* v. *Burnet,* 283 U. S. 140 (1931). There a taxpayer had endorsed notes issued by a corporation which later became insolvent. The taxpayer and his partner took up the notes with the creditor by replacing them with their own joint note. The Court unanimously held that this did not entitle the cash-basis taxpayer to a bad-debt deduction for, as the Board of Tax Appeals observed, he had " 'merely exchanged his note under which he was primarily liable for the corporation's notes under which he was secondarily liable, without any outlay of cash or property having a cash value.'" *Id.*, at 141. The second decision is *Helvering* v. *Price*, 309 U. S. 409 (1940). There the taxpayer argued that his giving a secured note to a bank in response to a guarantee gave rise to a deduction. The Court observed that the note "was not the equivalent of cash to entitle the taxpayer to the deduction," and concluded that the fact the note was secured made no difference in the result. "[T]he collateral was not payment. It was given to secure respondent's promise to pay" and "did not transform the promise into the payment required to constitute a deductible loss in the taxable year." *Id.*, at 413–414.[9]

The reasoning is apparent: the note may never be paid, and if it is not paid, "the taxpayer has parted with nothing more than his promise to pay." *Hart* v. *Commissioner*, 54 F. 2d 848, 852 (CA1 1932).

If, as was suggested, the language of § 404 (a) places all taxpayers on a cash basis with respect to payments to a qualified profit-sharing trust, the principle of *Eckert* and of *Price* clearly is controlling here. The petitioner argues, of course, that that principle is not applicable to the accrual-basis taxpayer. We are not persuaded. The statutory terms "paid" and "payment," coupled with the grace period and the legislative history's reference to "paid" and "actually paid," demonstrate that, regardless of the method of accounting, all taxpayers must pay out cash or its equivalent by the end of the grace period in order to qualify for the § 404 (a) deduction.

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[9] Other courts have applied *Eckert* and *Price* to situations other than a claimed bad-debt deduction. *Cleaver* v. *Commissioner*, 158 F. 2d 342 (CA7 1946), cert. denied, 330 U. S. 849 (1947) (interest); *Jenkins* v. *Bitgood*, 101 F. 2d 17 (CA2), cert. denied, 307 U. S. 636 (1939) (loss); *Baltimore Dairy Lunch, Inc.* v. *United States*, 231 F. 2d 870, 875 (CA8 1956) (loss); *Guren* v. *Commissioner*, 66 T. C. 118 (1976) (charitable contribution); *Petty* v. *Commissioner*, 40 T. C. 521, 524 (1963) (Atkins, J., for seven judges, concurring) (charitable contribution).

This accords, also, with the apparent policy behind the statutory provision, namely, that an objective outlay-of-assets test would insure the integrity of the employees' plan[10] and insure the full advantage of any contribution which entitles the employer to a tax benefit.

Other arguments advanced by the taxpayer are also unconvincing:

1. The taxpayer argues that because its notes are acknowledged to have had value, it is entitled to a deduction equal to that value. It is suggested that such a note would qualify as income to a seller-recipient. Whatever the situation might be with respect to the recipient, the note, for the maker, even though fully secured, is still only his promise to pay. It does not in itself constitute an outlay of cash or other property. A similar argument was made in *Helvering* v. *Price, supra,* and was not availing for the taxpayer there. See Brief for Respondent, O. T. 1939, No. 559, pp. 16–17.

2. The taxpayer suggests that the transaction equates with a payment of cash to the trustees followed by a loan, evidenced by the note in return, in the amount of the cash advanced. But

> "a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred.
>
> ". . . This Court has observed repeatedly that, while a

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[10] A similar policy applies to deductions for charitable contributions under § 170 (a) of the Code. These deductions, too, are limited to those the "payment of which is made within the taxable year," even though the particular taxpayer is on the accrual basis. See H. R. Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938), referring to §§ 23 (o) and (q) of the Revenue Act of 1938, 52 Stat. 463, 464.

> taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not." *Commissioner* v. *National Alfalfa Dehydrating,* 417 U. S. 134, 148–149 (1974).

See *Central Tablet Mfg. Co.* v. *United States,* 417 U. S. 673, 690 (1974).[11] What took place here is clear, and income tax consequences follow accordingly. We do not indulge in speculating how the transaction might have been recast with a different tax result.

3. Taxpayer heavily relies on the fact that three Courts of Appeals—the only courts at that level to pass upon the issue until the present case came to the Seventh Circuit, see n. 4, *supra*—have resolved the issue adversely to the Commissioner. We cannot ignore those decisions or lightly pass them by. Indeed, petitioner taxpayer has a stronger argument than the taxpayers in those cases because they concerned note transactions of somewhat lesser integrity, in the sense that the notes either bore a lower interest rate or no interest at all, or were less adequately secured. After careful review of those cases, however, we conclude that their analytical structure rests on two errors:

(a) The three Courts of Appeals, in considering § 404 (a), assumed, mistakenly we feel, that the word "paid" in the statute has the same meaning it possesses in § 267 (a).[12] The latter section disallows deductions by an accrual-basis taxpayer for certain items that are accrued but not yet paid to *related cash-basis* payees. The analogy the Courts of Appeals drew between § 404 (a) and § 267 (a) derives from two earlier cases, namely, *Anthony P. Miller, Inc.* v. *Commissioner,* 164 F. 2d 268 (CA3 1947), cert. denied, 333 U. S. 861 (1948), and *Musselman Hub-Brake Co.* v. *Commissioner,* 139 F. 2d 65 (CA6 1943), where it was ruled that an accrual-basis corporate taxpayer's delivery of a demand note to one of its officers for salary or to its controlling shareholder for royalties and interest effected a payment of those items under

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[11] By § 2003 (a) of the Employee Retirement Income Security Act of 1974, 88 Stat. 971, § 4975 was added to the 1954 Code. It makes an employer's issuance of its promissory note to a qualified profit-sharing plan a "prohibited transaction" subject to penalty. See §§ 4975 (a), (b), and (c)(1)(B). See also H. R. Conf. Rep. No. 93–1280, p. 308 (1974). By this penalty imposition, Congress has reaffirmed the actual-payment requirement of § 404 (a), and strengthened its enforceability.

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[12] Section 267 relates to items that would be deductible under §§ 162 or 212 and reads:

"(a) Deductions disallowed.

"No deduction shall be allowed—

. . . . .

"(2) Unpaid expenses and interest.

"In respect of expenses, otherwise deductible under section 162 or 212, or of interest, otherwise deductible under section 163,—

"(A) If within the period consisting of the taxable year of the taxpayer and 2½ months after the close thereof (i) such expenses or interest are not paid, and (ii) the amount thereof is not includible in the gross income of the person to whom the payment is to be made; and

"(B) If, by reason of the method of accounting of the person to whom the payment is to be made, the amount thereof is not, unless paid, includible in the gross income of such person for the taxable year in which or with which the taxable year of the taxpayer ends; and

"(C) If, at the close of the taxable year of the taxpayer or at any time within 2½ months thereafter, both the taxpayer and the person to whom the payment is to be made are persons specified within any one of the paragraphs of subsection (b).

"(b) Relationships.

"The persons referred to in subsection (a) are:

. . . . .

"(4) A grantor and a fiduciary of any trust . . . ."

Section 404 (a), on the other hand, concerns items specifically precluded as deductions under §§ 162 and 212.

§ 24 (c) of the 1939 Code (the predecessor of § 267 (a) of the 1954 Code).[13] But this interpretation of the term "paid" in § 267 (a) necessarily resulted from the desirability of affording simultaneously consistent treatment to the deduction and to the income inclusion. The statute's purpose was to prevent the tax avoidance that would result if an accrual-basis corporation could claim a deduction for an accrued item its related cash-basis payee would not include in income until it was paid, if ever. See H. R. Rep. No. 1546, 75th Cong., 1st Sess., 29 (1937); S. Rep. No. 1242, 75th Cong., 1st Sess., 31 (1937). Because the recipient of the note was required to include its value in income at the time of receipt, disallowance of the deduction to the maker corporation sympathetically was deemed not to serve the underlying policy of § 24 (c) of the 1939 Code. *Musselman,* 139 F. 2d, at 68; *Logan Engineering Co.* v. *Commissioner,* 12 T. C. 860, 868 (1949). The term "paid" in the statute was thus used merely, and only insofar as, to insure that transactions between related entities received consistent tax treatment. This situation has no counterpart under § 404 (a), for the qualified plan is exempt from tax. A policy consideration that might call for equivalence on both sides of the income tax ledger plainly is not present. And one is not brought into being by the fact that the trustees must disclose the note in the information report required to be filed by § 6047 (a) of the Code.

(b) The three Courts of Appeals seemed to equate a promissory note with a check. The line between the two may be thin at times, but it is distinct. The promissory note, even when payable on demand and fully secured, is still, as its name implies, only a promise to pay, and does not represent the paying out or reduction of assets. A check, on the other hand, is a direction to the bank for immediate payment, is a medium of exchange, and has come to be treated for federal tax purposes as a conditional payment of cash. *Estate of Spiegel* v. *Commissioner,* 12 T. C. 524 (1949); Rev. Rul. 54-465, 1954-2 Cum. Bull. 93. The factual difference is illustrated and revealed by taxpayer's own payment of each promissory note with a check within a year after issuance.

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[13] *Celina Mfg. Co.* v. *Commissioner,* 142 F. 2d 449 (CA6 1944); *Commissioner* v. *Mundet Cork Corp.,* 173 F. 2d 757 (CA2 1949); *Akron Welding & Spring Co.* v. *Commissioner,* 10 T. C. 715 (1948), are to the same effect. See Rev. Rul. 55-608, 1955-2 Cum. Bull. 546, 548.

We therefore find ourselves in disagreement with the result reached by the Third, Ninth, and Tenth Circuits in their respective cases hereinabove cited. We agree, instead, with the Tax Court in its uniform line of decisions and with the Seventh Circuit in the present case. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

MR. JUSTICE STEVENS, concurring.

MR. JUSTICE BLACKMUN'S opinion for the Court, which I join, construes the word "paid" to require the delivery of cash or its equivalent. In my judgment, that construction best serves the statutory purpose of protecting the integrity of pension plans because the employer and the pension trust are often controlled by the same interests.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, dissenting.

The Court says that § 404 (a) "places all taxpayers on a cash basis with respect to payments to a qualified profit-sharing trust." *Ante,* at 578. This assumption is the keystone of today's decision, for only by treating the petitioner as a cash-method taxpayer can the Court apply the rule of *Eckert* v. *Burnet,* 283 U. S. 140, and *Helvering* v. *Price,* 309 U. S.

409, to require the petitioner to have paid out "cash or its equivalent" in order to be allowed a deduction. But the assumption is just that—an *assumption* that is not and cannot be supported.

It is true, as the Court observes, *ante,* at 574–577, that the statute, the applicable committee reports, and the underlying Treasury Regulations all emphasize that the employer's contribution must be "paid"; [1] mere accrual of the obligation is therefore insufficient to obtain the deduction. The question in this case, however, is whether the word "paid" requires an accrual-basis taxpayer to part with "cash or its equivalent" or whether the obligation may be "paid" by the delivery of a negotiable, interest-bearing, fully secured demand note. When the Court responds by stating baldly that "the language of § 404 (a) places all taxpayers on a cash basis," it begs rather than answers the question.[2]

This question-begging assumption is at odds with the long-accepted principle that cash- and accrual-basis taxpayers should not be lumped together when applying statutes such as this one. The case of *Musselman Hub-Brake Co.* v. *Commissioner,* 139 F. 2d 65 (CA6), expressed this principle more than 30 years ago. There an accrual-method corporation sought a business-expense deduction for patent royalties and interest paid to its controlling shareholder in the form of demand promissory notes. The applicable statute, as in the present case, required business expenses to be "paid" in the taxpayer's taxable year or within two and one-half months thereafter. Internal Revenue Code of 1939, § 24 (c). The court held that the deduction was permissible, noting that *Eckert* and *Price* "are not in point here" because in each case "[t]he method of accounting followed by the taxpayer . . . was the premise of . . . decision." 139 F. 2d, at 69. The court explicitly rejected the contention that the requirement of actual payment "put an accrual taxpayer on a cash basis," and held that such a restrictive interpretation of the word "paid" was unnecessary to achieve the congressional purpose.

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[1] In some instances the language is "*actually* paid," see, *e. g.,* H. R. Rep. No. 2087, 80th Cong., 2d Sess., 13 (1948) (emphasis added), quoted *ante,* at 576, an embellishment that adds nothing of substance.

[2] The only thread of support the Court finds is the statement of one witness before the Senate Committee on Finance that § 404 (a) puts corporations "on a cash basis on the payment to trusts." *Ante,* at 575 n. 7. We have recently noted the gossamer quality of that kind of legislative history. *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 204 n. 24.

The *Musselman* decision, and the reasoning that underlies it, have been approved by the Courts of Appeals in case after case, in connection with both § 404 (a) and other analogous provisions of the Internal Revenue Code. See, *e. g., Fetzer Refrigerator Co.* v. *United States,* 437 F. 2d 577 (CA6); *Wasatch Chemical Co.* v. *Commissioner,* 313 F. 2d 843 (CA10); *Time Oil Co.* v. *Commissioner,* 258 F. 2d 237 (CA9); *Sachs* v. *Commissioner,* 208 F. 2d 313 (CA3); *Commissioner* v. *Mundet Cork Corp.,* 173 F. 2d 757 (CA2); *Anthony P. Miller, Inc.* v. *Commissioner,* 164 F. 2d 268 (CA3); *Celina Mfg. Co.* v. *Commissioner,* 142 F. 2d 449 (CA6); accord, *Advance Constr. Co.* v. *United States,* 356 F. Supp. 1267 (ND Ill.). See also *Hart* v. *Commissioner,* 54 F. 2d 848, 851–852 (CA1). The Court of Appeals for the Sixth Circuit considered the doctrine most recently in *Patmon, Young & Kirk* v. *Commissioner,* 536 F. 2d 142 (1976), a case decided after the decision of the Seventh Circuit that the Court affirms today. The court in *Patmon,* relying on *Eckert* and *Price,* denied a § 404 (a) deduction to a cash-basis taxpayer that had contributed a guaranteed demand note to its profit-sharing trust. The court was careful, however, to distinguish accrual-method taxpayers, noting that "the word 'paid' [must] be defined in the context and in light of the purpose of the particular statute in which it is used." 536 F. 2d, at 144.

In short, until the Court of Appeals for the Seventh Circuit held as it did in the present case, no federal appellate court had ever held that use of the word "paid" in a statute such as § 404 (a) requires that cash- and accrual-basis taxpayers be treated identically.[3] This unanimity was soundly supported by a long-established principle of tax law—that the construction of words in a tax statute should be in "harmony with the statutory scheme and purpose." *Helvering* v. *Hutchings*, 312 U. S. 393, 398. Under this principle, there is no reason to suppose that the word "paid" means the same thing with respect to taxpayers who use different accounting methods, and every reason to suppose it does not.

The *Eckert* and *Price* cases, requiring the payment of "cash or its equivalent," were explicitly premised on the taxpayers' use of the cash method. See *Eckert*, 283 U. S., at 141 ("For the purpose of a return upon a cash basis, there was no loss in 1925"); *Price*, 309 U. S., at 413 ("As the return was on the cash basis, there could be no deduction in the year 1932 . . .").[4] Indeed, their focus explains their result. Because the returns at issue were filed on a cash basis, the thrust of the inquiry was upon determining what the taxpayers had surrendered. They had given up nothing of immediate cash value *to them,* and so it would have been inconsistent with fundamental principles of cash-method accounting to have allowed them deductions.

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[3] The invocation of the "re-enactment doctrine" in the Court's opinion today, *ante*, at 576–577, is therefore dramatically misplaced. The "administrative construction" of § 404 (a) that supposedly received congressional approval when the 1954 Code was enacted was in fact nothing more than an administrative rehash of the statutory language that did not illumine its meaning. The regulation, Treas. Reg. § 1.404 (a)–1 (c), 26 CFR § 1.404 (a)–1 (c) (1975), refers simply to "actual payments" and restates the statute's requirements that the employer's contribution to the profit-sharing plan be "paid" before a deduction may be had. That the contribution must be "paid" whether the taxpayer files his returns on the accrual or cash method of accounting of course does not bear on the question whether the word "paid" means the same thing in both situations. The answer to this question in the appellate courts as of 1954 was clearly "no." Thus, the "re-enactment doctrine" not only fails to support the Court's decision in this case, but cuts strongly against it.

[4] The Court correctly notes that *Eckert* and *Price* have been applied to claimed deductions for items other than bad debts, such as interest and business losses, *ante*, at 578 n. 9, but all of the cases that the Court cites involved cash-basis taxpayers.

In this case, however, the taxpayer seeking the deductions keeps its books on the accrual basis; no accounting principles require that the inquiry be focused on the value to it of the property it surrenders or that its payments be made in cash or the equivalent. In such a situation I think "the word 'paid' [must] be defined in the context and in light of the purpose of the particular statute in which it is used." *Patmon, Young & Kirk* v. *Commissioner, supra,* at 144. That is, the normal rules governing accrual-method accounting should apply except as necessary to achieve the purpose of § 404 (a). Since that purpose is to protect the employees' trust fund and to ensure that the fund receives the "full advantage" of the employer's deductible contribution, *ante,* at 579, the focus is properly on the value *to the trust* of what it has received. Here it received tangible, interest-bearing, fully secured demand notes, upon which the trust concededly could have obtained full face value at any local bank. The notes would have been "income" to any cash-basis taxpayer, and the trust was required to report them as such. *Ante,* at 582. Indeed, the Commissioner concedes that the petitioner could have obtained its deductions had it tendered to the trust identical notes of a different company, for such a transaction would have been treated as a deductible transfer of property. See *Colorado Nat. Bank of Denver* v. *Commissioner,* 30 T. C. 933.

Plainly, then, neither the purpose of the statute nor any principles of cash-basis or accrual-basis accounting require or even suggest a construction of the word "paid" in § 404 (a) to deny this accrual-method taxpayer a deduction because it did not part with "cash or its equivalent" during the statutory period. As the Court says, the term "paid" in § 404 (a) was used to "insure the integrity of the employees' plan and insure the full advantage of any contribution which entitles the employer to a tax benefit." *Ante,* at 579. That purpose was wholly served by the delivery of negotiable, interest-bearing, fully secured demand notes.[5]

I would reverse the judgment of the Court of Appeals.

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[5] The Court's construction of § 404 (a) is inconsistent with its analysis of § 267 (a). The term "paid" in § 267 (a), the Court acknowledges, was used "merely, and only insofar as" necessary to accomplish that section's purpose of ensuring consistent tax treatment of transactions between related entities. *Ante,* at 582. The implication is that normal accounting principles continue to apply to the full extent that their application is consistent with that purpose, and the cases the Court cites so hold. *Anthony P. Miller, Inc.* v. *Commissioner,* 164 F. 2d 268 (CA3); *Musselman Hub-Brake Co.* v. *Commissioner,* 139 F. 2d 65 (CA6). The Court never explains why the same logic should not inform the construction of § 404 (a).

# WHALEN, COMMISSIONER OF HEALTH OF NEW YORK v. ROE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 75-839. Argued October 13, 1976—Decided February 22, 1977

Responding to a concern that drugs were being diverted into unlawful channels, the New York Legislature in 1972 enacted a statutory scheme to correct defects in the previous law. The 1972 statute classifies potentially harmful drugs and provides that prescriptions for the category embracing the most dangerous legitimate drugs (Schedule II) be prepared on an official form. One copy of the form, which requires identification of the prescribing physician, dispensing pharmacy, drug and dosage, and the patient's name, address, and age, must be filed with the State Health Department, where pertinent data are recorded on tapes for computer processing. All forms are retained for a five-year period under a system to safeguard their security, and are thereafter destroyed. Public disclosure of the patient's identity is prohibited, and access to the files is confined to a limited number of health department and investigatory personnel. Appellees, including a group of patients regularly receiving Schedule II drugs and prescribing doctors, brought this action challenging the constitutionality of the Schedule II patient-identification requirements. Holding that "the doctor-patient relationship is one of the zones of privacy accorded constitutional protection" and that the Act's patient-identification provisions invaded that zone with "a needlessly broad sweep," since appellant had been unable to demonstrate the need for those requirements, a three-judge District Court enjoined the enforcement of the challenged provisions. *Held:*

1. The patient-identification requirement is a reasonable exercise of the State's broad police powers, and the District Court's finding that the necessity for the requirement had not been proved is not a sufficient reason for holding the statute unconstitutional. Pp. 596-598.

2. Neither the immediate nor the threatened impact of the patient-identification requirement on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated suffices to constitute an invasion of any right or liberty protected by the Fourteenth Amendment. Pp. 598-604.

(a) The possibility that a doctor or pharmacist may voluntarily reveal information on a prescription form, which existed under prior law, is unrelated to the computerized data bank. Pp. 600-601.

(b) There is no support in the record or in the experience of the two States that the New York program emulates for assuming that the statute's security provisions will be improperly administered. P. 601.

(c) The remote possibility that judicial supervision of the evidentiary use of particular items of stored information will not provide adequate protection against unwarranted disclosure is not a sufficient reason for invalidating the entire patient-identification program. Pp. 601-602.

(d) Though it is argued that concern about disclosure may induce patients to refuse needed medication, the 1972 statute does not deprive the public of access to Schedule II drugs, as is clear from the fact that about 100,000 prescriptions for such drugs were filed each month before the District Court's injunction was entered. Pp. 602-603.

3. Appellee doctors' contention that the 1972 statute impairs their right to practice medicine free from unwarranted state interference is without merit, whether it refers to the statute's impact on their own procedures, which is no different from the impact of the prior statute, or refers to the patients' concern about disclosure that the Court has rejected (see 2 (d), *supra*). P. 604.

403 F. Supp. 931, reversed.

STEVENS, J., delivered the opinion for a unanimous Court. BRENNAN, J., *post*, p. 606, and STEWART, J., *post*, p. 607, filed concurring opinions.

*A. Seth Greenwald,* Assistant Attorney General of New York, argued the cause for appellant. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

*Michael Lesch* argued the cause for appellees Roe et al. With him on the brief was *Solomon Z. Ferziger. H. Miles Jaffe* argued the cause for appellees Patient et al. With him on the brief were *Melvin L. Wulf* and *John H. F. Shattuck.**

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**Evelle J. Younger,* Attorney General of California, *Jack R. Winkler,* Chief Assistant Attorney General, *S. Clark Moore,* Assistant Attorney General, and *Shunji Asari* and *Owen Lee Kwong,* Deputy Attorneys Gen-

MR. JUSTICE STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, 424 U. S. 907, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses. In response to a concern that such drugs were being diverted into unlawful channels, in 1970 the New York Legislature created a special commission to evaluate the State's drug-control laws.[4] The commission found the existing laws defi-

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eral, filed a brief for the State of California as *amicus curiae* urging reversal.

*Robert Plotkin* and *Paul R. Friedman* filed a brief for the National Association of Mental Health et al. as *amici curiae* urging affirmance.

[1] 1972 N. Y. Laws, c. 878; N. Y. Pub. Health Law § 3300 *et seq.* (McKinney, Supp. 1976–1977) (hereafter Pub. Health Law, except as indicated in n. 13, *infra*).

[2] *Roe* v. *Ingraham,* 403 F. Supp. 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. *Roe* v. *Ingraham,* 357 F. Supp. 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. *Roe* v. *Ingraham,* 480 F. 2d 102 (CA2 1973).

[3] Jurisdiction is conferred by 28 U. S. C. §§ 1253, 2101 (b).

[4] 1970 N. Y. Laws, c. 474, amended by 1971 N. Y. Laws, c. 7. The Temporary State Commission to Evaluate the Drug Laws (hereafter T. S. C.) issued two reports which, it is stipulated, constitute part of the legislative history of the Act. The reports are the Interim Report of the Temporary State Commission to Evaluate the Drug Laws (State of New York, Legislative Doc. No. 10, Jan. 1972); and the Second Interim

cient in several respects. There was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, or to prevent doctors from overprescribing, either by authorizing an excessive amount in one prescription or by giving one patient multiple prescriptions.[5] In drafting new legislation to correct such defects, the commission consulted with enforcement officials in California and Illinois where central reporting systems were being used effectively.[6]

The new New York statute classified potentially harmful drugs in five schedules.[7] Drugs, such as heroin, which are highly abused and have no recognized medical use, are in Schedule I; they cannot be prescribed. Schedules II through V include drugs which have a progressively lower potential for abuse but also have a recognized medical use. Our

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Report of the Temporary State Commission to Evaluate the Drug Laws (Albany, N. Y., Apr. 5, 1971).

[5] *Id.*, at 3–5.

[6] The Chairman of the T. S. C. summarized its findings:

"Law enforcement officials in both California and Illinois have been consulted in considerable depth about the use of multiple prescriptions, since they have been using them for a considerable period of time. They indicate to us that they are not only a useful adjunct to the proper identification of culpable professional and unscrupulous drug abusers, but that they also give a reliable statistical indication of the pattern of drug flow throughout their states: information sorely needed in this state to stem the tide of diversion of lawfully manufactured controlled substances." Memorandum of Chester R. Hardt, App. 87a–88a.

T. S. C. Interim Report 21; T. S. C. Second Interim Report 27–44. Cal. Health & Safety Code §§ 11158, 11160, 11167 (West, 1975 and Supp. 1976); Ill. Ann. Stat., c. 56½, §§ 1308, 1311, 1312 (a) (Supp. 1977).

[7] These five schedules conform in all material aspects with the drug schedules in the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U. S. C. § 801 *et seq.*

concern is limited to Schedule II, which includes the most dangerous of the legitimate drugs.[8]

With an exception for emergencies, the Act requires that all prescriptions for Schedule II drugs be prepared by the physician in triplicate on an official form.[9] The completed form identifies the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient. One copy of the form is retained by the physician, the second by the pharmacist, and the third is forwarded to the New York State Department of Health in Albany. A prescription made on an official form may not exceed a 30-day supply, and may not be refilled.[10]

The District Court found that about 100,000 Schedule II prescription forms are delivered to a receiving room at the Department of Health in Albany each month. They are sorted, coded, and logged and then taken to another room where the data on the forms is recorded on magnetic tapes for processing by a computer. Thereafter, the forms are returned to the receiving room to be retained in a vault for a five-year period and then destroyed as required by the statute.[11]

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[8] These include opium and opium derivatives, cocaine, methadone, amphetamines, and methaqualone. Pub. Health Law § 3306. These drugs have accepted uses in the amelioration of pain and in the treatment of epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches.

[9] Pub. Health Law §§ 3334, 3338. These forms are prepared and issued by the Department of Health, numbered serially, in groups of 100 forms at $10 per group (10 cents per triplicate form). New York State Health Department—Official New York State Prescription, Form NC-77 (8/72).

[10] Pub. Health Law §§ 3331-3333, 3339. The pharmacist normally forwards the prescription to Albany after filling it. If the physician dispenses the drug himself, he must forward two copies of the prescription to the Department of Health, § 3331 (6).

[11] Pub. Health Law § 3370(3), 1974 N. Y. Laws, c. 965, § 16. The physician and the pharmacist are required to retain their copies for five years

The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation.[12] Willful viola-

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also, Pub. Health Law §§ 3331 (6), 3332 (4), 3333(4), but they are not required to destroy them.

[12] Section 3371 of the Pub. Health Law states:

"1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

"(a) to another person employed by the department, for purposes of executing provisions of this article; or

"(b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or

"(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or

"(d) to a central registry established pursuant to this article.

"2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public."

Pursuant to its statutory authority, the Department of Health has promulgated regulations in respect of confidentiality as follows:

"No person who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

"(a) to another person who by virtue of his office as an employee of the department is entitled to obtain such information; or tion of these prohibitions is a crime punishable by up to one year in prison and a $2,000 fine.[13] At the time of trial there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified by the computer. Twenty months after the effective date of the Act, the computerized data had only been used in two investigations involving alleged overuse by specific patients.

A few days before the Act became effective, this litigation was commenced by a group of patients regularly receiving prescriptions for Schedule II drugs, by doctors who prescribe such drugs, and by two associations of physicians.[14] After various preliminary proceedings,[15] a three-judge District Court conducted a one-day trial. Appellees offered evidence tending to prove that persons in need of treatment with Schedule II drugs will from time to time decline such treatment because of their fear that the misuse of the computerized data will cause them to be stigmatized as "drug addicts." [16]

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"(b) pursuant to judicial subpoena or court order in a criminal investigation or proceedings; or

"(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by article 33 of the Public Health Law to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or

"(d) to a central registry established pursuant to article 33 of the Public Health Law." 10 N. Y. C. R. R. § 80.107 (1973).

[13] N. Y. Pub. Health Law § 12-b (2) (McKinney 1971).

[14] The physicians' associations, Empire State Physicians Guild, Inc. and the American Federation of Physicians and Dentists, articulate no claims which are severable from the claims of the named physicians. We therefore find it unnecessary to consider whether the organizations themselves may have standing to maintain these suits.

[15] In addition to the appeal from the original dismissal of the complaint, the parties took depositions which were made a part of the record and entered into a stipulation of facts.

[16] Two parents testified that they were concerned that their children

The District Court held that "the doctor-patient relationship is one of the zones of privacy accorded constitutional protection" and that the patient-identification provisions of the Act invaded this zone with "a needlessly broad sweep," and enjoined enforcement of the provisions of the Act which deal with the reporting of patients' names and addresses.[17]

## I

The District Court found that the State had been unable to demonstrate the necessity for the patient-identification requirement on the basis of its experience during the first 20 months of administration of the new statute. There was a time when that alone would have provided a basis for invalidating the statute. *Lochner* v. *New York,* 198 U. S. 45, involved legislation making it a crime for a baker to permit his employees to work more than 60 hours in a week. In an opinion no longer regarded as authoritative, the Court held the statute unconstitutional as "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ." *Id.,* at 56.

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would be stigmatized by the State's central filing system. One child had been taken off his Schedule II medication because of this concern. Three adult patients testified that they feared disclosure of their names would result from central filing of patient identifications. One of them now obtains his drugs in another State. The other two continue to receive Schedule II prescriptions in New York, but continue to fear disclosure and stigmatization. Four physicians testified that the prescription system entrenches on patients' privacy, and that each had observed a reaction of shock, fear, and concern on the part of their patients whom they had informed of the plan. One doctor refuses to prescribe Schedule II drugs for his patients. On the other hand, over 100,000 patients per month have been receiving Schedule II drug prescriptions without their objections, if any, to central filing having come to the attention of the District Court. The record shows that the provisions of the Act were brought to the attention of the section on psychiatry of the New York State Medical Society (App. 166a), but that body apparently declined to support this suit.

[17] Pub. Health Law §§ 3331 (6), 3332 (2)(a), 3333 (4).

The holding in *Lochner* has been implicitly rejected many times.[18] State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part.[19] For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.[20]

The New York statute challenged in this case represents a considered attempt to deal with such a problem. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators[21] as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control.[22] For if an experiment fails—if in this case experience teaches that the patient-identification requirement results in the foolish expenditure of funds to acquire a mountain of useless information—the legislative process remains available to terminate the unwise experiment. It follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional.

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[18] *Roe* v. *Wade,* 410 U. S. 113, 117; *Griswold* v. *Connecticut,* 381 U. S. 479, 481–482; *Ferguson* v. *Skrupa,* 372 U. S. 726, 729–730; *FHA* v. *The Darlington, Inc.,* 358 U. S. 84, 91–92.

[19] "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation." *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.,* 313 U. S. 236, 246.

[20] Mr. Justice Brandeis' classic statement of the proposition merits reiteration:

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (dissenting opinion) (footnote omitted).

## II

Appellees contend that the statute invades a constitutionally protected "zone of privacy."[23] The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests.[24] One is the individual interest in avoiding disclosure of personal matters,[25] and another is the interest in independence in making certain

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[21] The absence of detected violations does not, of course, demonstrate that a statute has no significant deterrent effect.

"From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs . . . ." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61 (citations omitted). "Nothing in the Constitution prohibits a State from reaching . . . a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Id.*, at 63.

[22] "Such regulation, it can be assumed, could take a variety of valid forms." *Robinson* v. *California*, 370 U. S. 660, 664. Cf. *Minnesota ex rel. Whipple* v. *Martinson*, 256 U. S. 41, 45; *Beauharnais* v. *Illinois*, 343 U. S. 250, 261–262.

[23] As the basis for the constitutional claim they rely on the shadows cast by a variety of provisions in the Bill of Rights. Language in prior

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opinions of the Court or its individual Justices provides support for the view that some personal rights "implicit in the concept of ordered liberty" (see *Palko* v. *Connecticut,* 302 U. S. 319, 325, quoted in *Roe* v. *Wade,* 410 U. S., at 152), are so "fundamental" that an undefined penumbra may provide them with an independent source of constitutional protection. In *Roe* v. *Wade,* however, after carefully reviewing those cases, the Court expressed the opinion that the "right of privacy" is founded in the Fourteenth Amendment's concept of personal liberty, *id.,* at 152-153.

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is,* or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.,* at 153 (emphasis added). See also *id.,* at 168-171 (STEWART, J., concurring); *Griswold* v. *Connecticut,* 381 U. S. 479, 500 (Harlan, J., concurring in judgment).

[24] Professor Kurland has written:

"The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." The private I, the University of Chicago Magazine 7, 8 (autumn 1976). The first of the facets which he describes is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interests referred to in the text.

[25] In his dissent in *Olmstead* v. *United States,* 277 U. S. 438, 478, Mr. Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men"; in *Griswold* v. *Connecticut,* 381 U. S. 479, 483, the Court said: "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." See also *Stanley* v. *Georgia,* 394 U. S. 557; *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 79 (Douglas, J., dissenting); *id.,* at 78 (POWELL, J., concurring).

kinds of important decisions.[26] Appellees argue that both of these interests are impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.

Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.

The third possibility existed under the prior law and is entirely unrelated to the existence of the computerized data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly.[27] And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.[28]

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[26] *Roe* v. *Wade, supra; Doe* v. *Bolton,* 410 U. S. 179; *Loving* v. *Virginia,* 388 U. S. 1; *Griswold* v. *Connecticut, supra; Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390; *Allgeyer* v. *Louisiana,* 165 U. S. 578. In *Paul* v. *Davis,* 424 U. S. 693, 713, the Court characterized these decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."

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[27] The T. S. C.'s independent investigation of the California and Illinois central filing systems failed to reveal a single case of invasion of a patient's privacy. T. S. C. Memorandum of Chester R. Hardt, Chairman, Re: Triplicate Prescriptions, New York State Controlled Substances Act, effective Apr. 1, 1973 (reproduced at App. 88a).

Just last Term in *Buckley* v. *Valeo,* 424 U. S. 1, we rejected a contention that the reporting requirements of the Federal Election Campaign Act of 1971 violated the First Amendment rights of those who contribute to minority parties:

"But no appellant in this case has tendered record evidence . . . . Instead, appellants primarily rely on 'the clearly articulated fears of individuals, well experienced in the political process.' . . . At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." 424 U. S., at 71–72 (footnote omitted).

Here, too, appellees urge on us "clearly articulated fears" about the pernicious effects of disclosure. But this requires us to assume even more than that we refused to do in *Buckley.* There the disclosures were to be made in accordance with the statutory scheme. Appellees' disclosures could only be made if the statutory scheme were *violated* as described, *supra,* at 594–595.

The fears of parents on behalf of their pre-adolescent children who are receiving amphetamines in the treatment of hyperkinesia are doubly premature. Not only must the Act's nondisclosure provisions be violated in order to stigmatize the children as they enter adult life, but the provisions requiring destruction of all prescription records after five years would have to be ignored, see n. 11, *supra,* and accompanying text.

Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.[29] Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

Appellees also argue, however, that even if unwarranted disclosures do not actually occur, the knowledge that the information is readily available in a computerized file creates a genuine concern that causes some persons to decline needed medication. The record supports the conclusion that some use of Schedule II drugs has been discouraged by that concern; it also is clear, however, that about 100,000 prescriptions for such drugs were being filled each month prior to the entry of the District Court's injunction. Clearly, therefore, the statute did not deprive the public of access to the drugs.

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[28] The physician-patient evidentiary privilege is unknown to the common law. In States where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons. C. McCormick, Evidence §§ 98, 101–104 (2d ed. 1972); 8 J. Wigmore, Evidence § 2380, nn. 3, 5, 6, §§ 2388–2391 (McNaughton rev. ed. 1961).

[29] Familiar examples are statutory reporting requirements relating to venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fetal death. Last Term we upheld the recordkeeping requirements of the Missouri abortion laws against a challenge based on the protected interest in making the abortion decision free of governmental intrusion, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 79–81.

Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication. Although the State no doubt could prohibit entirely the use of particular Schedule II drugs,[30] it has not done so. This case is therefore unlike those in which the Court held that a total prohibition of certain conduct was an impermissible deprivation of liberty. Nor does the State require access to these drugs to be conditioned on the consent of any state official or other third party.[31] Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, is left entirely to the physician and the patient.

We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.[32]

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[30] It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions. *Robinson* v. *California,* 370 U. S., at 664–665; *Minnesota ex rel. Whipple* v. *Martinson,* 256 U. S., at 45; *Barsky* v. *Board of Regents,* 347 U. S. 442, 449.

[31] In *Doe* v. *Bolton,* 410 U. S. 179, for instance, the constitutionally defective statute required the written concurrence of two state-licensed physicians, *other than* the patient's personal physician, before an abortion could be performed, and the advance approval of a committee of not less than three members of the hospital staff where the procedure was to be performed, regardless of whether the committee members had a physician-patient relationship with the woman concerned.

## III

The appellee doctors argue separately that the statute impairs their right to practice medicine free of unwarranted state interference. If the doctors' claim has any reference to the impact of the 1972 statute on their own procedures, it is clearly frivolous. For even the prior statute required the doctor to prepare a written prescription identifying the name and address of the patient and the dosage of the prescribed drug. To the extent that their claim has reference to the possibility that the patients' concern about disclosure may induce them to refuse needed medication, the doctors' claim is derivative from, and therefore no stronger than, the patients'.[33] Our rejection of their claim therefore disposes of the doctors' as well.

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[32] The Roe appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in *Terry* v. *Ohio,* 392 U. S. 1, 9, at a point where it quotes from *Katz* v. *United States,* 389 U. S. 347. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.

Likewise the Patient appellees derive a right to individual anonymity from our freedom of association cases such as *Bates* v. *Little Rock,* 361 U. S. 516, 522–523, and *NAACP* v. *Alabama,* 357 U. S. 449, 462. But those cases protect "freedom of association for the purpose of advancing ideas and airing grievances," *Bates* v. *Little Rock, supra,* at 523, not anonymity in the course of medical treatment. Also, in those cases there was an uncontroverted showing of past harm through disclosure, *NAACP* v. *Alabama, supra,* at 462, an element which is absent here.

Cf. *Schulman* v. *New York City Health & Hospitals Corp.,* 38 N. Y. 2d 234, 342 N. E. 2d 501 (1975).

[33] The doctors rely on two references to a physician's right to administer medical care in the opinion in *Doe* v. *Bolton,* 410 U. S., at 197–198, and 199. Nothing in that case suggests that a doctor's right to administer medical care has any greater strength than his patient's right to

## IV

A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.[34] The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure

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receive such care. The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

[34] Boyer, Computerized Medical Records and the Right to Privacy: The Emerging Federal Response, 25 Buffalo L. Rev. 37 (1975); Miller, Computers, Data Banks and Individual Privacy: An Overview, 4 Colum. Human Rights L. Rev. 1 (1972); A. Miller, The Assault on Privacy (1971). See also *Utz* v. *Cullinane,* 172 U. S. App. D. C. 67, 78–82, 520 F. 2d 467, 478–482 (1975).

of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

*Reversed.*

MR. JUSTICE BRENNAN, concurring.

I write only to express my understanding of the opinion of the Court, which I join.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy, *ante*, at 598–600, and nn. 24–25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are familiar, *ante*, at 602 n. 29, and are not generally regarded as an invasion of privacy. Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113, 155–156 (1973).

What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows, the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.

In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure. Given this serious and, so far as the record shows, successful effort to prevent abuse and limit access to the personal information at issue, I cannot say that the statute's provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests, any more than the more traditional reporting provisions.

In the absence of such a deprivation, the State was not required to prove that the challenged statute is absolutely necessary to its attempt to control drug abuse. Of course, a statute that did effect such a deprivation would only be consistent with the Constitution if it were necessary to promote a compelling state interest. *Roe* v. *Wade, supra; Eisenstadt* v. *Baird,* 405 U. S. 438, 464 (1972) (WHITE, J., concurring in result).

MR. JUSTICE STEWART, concurring.

In *Katz* v. *United States,* 389 U. S. 347, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters,* there is no "general constitutional 'right to

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*See 389 U. S., at 350 n. 5:

"The First Amendment, for example, imposes limitations upon govern-privacy.' . . . [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.*, at 350–351 (footnote omitted).

MR. JUSTICE BRENNAN's concurring opinion states that "[b]road dissemination by state officials of [the information collected by New York State] . . . would clearly implicate constitutionally protected privacy rights . . . ." *Ante*, at 606. The only possible support in his opinion for this statement is its earlier reference to two footnotes in the Court's opinion, *ibid.*, citing *ante*, at 598–600, and nn. 24–25 (majority opinion). The footnotes, however, cite to only two Court opinions, and those two cases do not support the proposition advanced by MR. JUSTICE BRENNAN.

The first case referred to, *Griswold* v. *Connecticut*, 381 U. S. 479, held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home. Although the broad language of the opinion includes a discussion of privacy, see *id.*, at 484–485, the constitutional protection there discovered also related to (1) marriage, see *id.*, at 485–486; *id.*, at 495 (Goldberg, J., concurring); *id.*, at

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mental abridgment of 'freedom to associate and privacy in one's association.' *NAACP* v. *Alabama*, 357 U. S. 449, 462. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for . . . ". . . the right of each individual 'to a private enclave where he may lead a private life.'"' *Tehan* v. *Shott*, 382 U. S. 406, 416. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

As the Court notes, *ante*, at 599–600, and n. 26, there is also a line of authority, often characterized as involving "privacy," affording constitutional protection to the autonomy of an individual or a family unit in making decisions generally relating to marriage, procreation, and raising children.

500 (Harlan, J., concurring in judgment), citing *Poe* v. *Ullman,* 367 U. S. 497, 522 (Harlan, J., dissenting); 381 U. S., at 502–503 (WHITE, J., concurring in judgment); (2) privacy *in the home,* see *id.,* at 484–485 (majority opinion); *id.,* at 495 (Goldberg, J., concurring); *id.,* at 500 (Harlan, J., concurring in judgment), citing *Poe* v. *Ullman, supra,* at 522 (Harlan, J., dissenting); and (3) the right to use contraceptives, see 381 U. S., at 503 (WHITE, J., concurring in judgment); see also *Roe* v. *Wade,* 410 U. S. 113, 169–170 (STEWART, J., concurring). Whatever the *ratio decidendi* of *Griswold,* it does not recognize a general interest in freedom from disclosure of private information.

The other case referred to, *Stanley* v. *Georgia,* 394 U. S. 557, held that an individual cannot constitutionally be prosecuted for possession of obscene materials in his home. Although *Stanley* makes some reference to privacy rights, *id.,* at 564, the holding there was simply that the *First* Amendment—as made applicable to the States by the Fourteenth—protects a person's right to read what he chooses in circumstances where that choice poses no threat to the sensibilities or welfare of others, *id.,* at 565–568.

Upon the understanding that nothing the Court says today is contrary to the above views, I join its opinion and judgment.

# UNITED STATES STEEL CORP. ET AL. *v.* FORTNER ENTERPRISES, INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-853. Argued November 1, 1976—Decided February 22, 1977

In exchange for respondent real estate development corporation's promise to purchase prefabricated houses to be erected on certain land, petitioner United States Steel Corp.'s Home Division (the manufacturer of the houses) and petitioner Credit Corp., a wholly owned subsidiary that provides financing to the Home Division's customers, agreed to finance respondent's cost of acquiring and developing the land. After difficulties arose while the development was in progress, respondent brought a treble-damages action against petitioners, alleging that the transaction was a tying arrangement forbidden by the Sherman Act, because the competition for prefabricated houses (the tied product) was restrained by petitioners' abuse of power over credit (the tying product). After this Court, in a prior review of the case upon reversing a summary judgment in petitioners' favor, held that the agreement affected a "not insubstantial" amount of commerce in the tied product and that respondent was entitled to an opportunity to prove that petitioners possessed "appreciable economic power" in the market for the tying product, the District Court ultimately held that the evidence justified the conclusion that petitioners did have sufficient economic power in the credit market to make the tying arrangement unlawful, and the Court of Appeals affirmed. That evidence related to four propositions: (1) petitioner Credit Corp. and the Home Division were owned by one of the Nation's largest corporations; (2) petitioners entered into tying arrangements with a significant number of customers in addition to respondent; (3) the Home Division charged respondent a noncompetitive price for its prefabricated houses; and (4) the financing provided to respondent was "unique," primarily because it covered 100% of respondent's acquisition and development costs. *Held:* The record does not support the conclusion that petitioners had appreciable economic power in the market for credit, the tying product. Where the record merely shows that the credit terms are unique because the seller was willing to accept a lesser profit—or to incur greater risks—than its competitors, such uniqueness does not give rise to any inference of economic power in the credit market. The unusual credit bargain offered to respondent proves nothing more than a willingness to provide cheap financing in order to sell expensive houses, and without any evidence that the Credit Corp. had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the lower courts' conclusion that petitioners had the kind of economic power that respondent had the burden of proving in order to prevail. Pp. 614–622.

523 F. 2d 961, reversed.

Stevens, J., delivered the opinion for a unanimous Court. Burger, C. J., filed a concurring opinion, in which Rehnquist, J., joined, *post*, p. 622.

*Macdonald Flinn* argued the cause for petitioners. With him on the briefs were *Albert F. Reutlinger, William H. Buchanan,* and *Norman Yoerg, Jr.*

*Kenneth L. Anderson* argued the cause for respondent. With him on the briefs was *A. Scott Hamilton, Jr.*

Mr. Justice Stevens delivered the opinion of the Court.

In exchange for respondent's promise to purchase prefabricated houses to be erected on land near Louisville, Ky., petitioners agreed to finance the cost of acquiring and developing the land. Difficulties arose while the development was in progress, and respondent (Fortner) commenced this treble-damages action, claiming that the transaction was a tying arrangement forbidden by the Sherman Act. Fortner alleged that competition for prefabricated houses (the tied product) was restrained by petitioners' abuse of power over credit (the tying product). A summary judgment in favor of petitioners was reversed by this Court. *Fortner Enterprises* v. *United States Steel Corp.,* 394 U. S. 495 (*Fortner I*). We held that the agreement affected a "not insubstantial" amount of commerce in the tied product and that Fortner was entitled to an opportunity to prove that petitioners possessed "appreciable economic power" in the market for the tying product. The question now presented is whether the record supports the conclusion that petitioners had such power in the credit market.[1]

The conclusion that a violation of § 1 of the Sherman Act[2] had been proved was only reached after two trials. At the first trial following our remand, the District Court directed a verdict in favor of Fortner on the issue of liability, and submitted only the issue of damages to the jury. The jury assessed damages, before trebling, of $93,200. The Court of Appeals reversed the directed verdict and remanded for a new trial on liability. 452 F. 2d 1095 (CA6 1971), cert. denied, 406 U. S. 919. The parties then waived the jury; the trial judge heard additional evidence, and entered extensive findings of fact which were affirmed on appeal. 523 F. 2d 961 (1975). Both courts held that the findings justified the conclusion that petitioners had sufficient economic power in the credit market to make the tying arrangement unlawful.

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[1] As explained at the outset of the opinion, *Fortner I* involved "a variety of questions concerning the proper standards to be applied by a United States district court in passing on a motion for summary judgment in a civil antitrust action." 394 U. S., at 496. Petitioners do not ask us to re-examine *Fortner I*, which left only the economic-power question open on the issue of whether a *per se* violation could be proved. On the other hand, Fortner has not pursued the suggestion in *Fortner I* that it might be able to prove a § 1 violation under the rule-of-reason standard. 394 U. S., at 500. Thus, with respect to § 1, only the economic-power issue is before us.

In *Fortner I*, the Court noted that Fortner also alleged a § 2 violation, namely, that petitioners "conspired together for the purpose of . . . acquiring a monopoly in the market for prefabricated houses." 394 U. S., at 500. The District Court held that a § 2 violation had been proved. Although the Court of Appeals did not reach this issue, a remand is unnecessary. It is clear that neither the District Court's findings of fact nor the record supports the conclusion that § 2 was violated. The District Court found only that "the defendants did combine or conspire to *increase sales* of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision" and that "the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to *increase the share of the market* of United States Steel Corporation in prefabricated house packages . . . ." App. 1603 (emphasis added). But "increasing sales" and "increasing market share" are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize. The evidence in this case does not bridge the gap between the District Court's findings of intent to increase sales and its legal conclusion of conspiracy to monopolize. Moreover, petitioners did not have a large market share or dominant market position. See n. 3, *infra*. No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales. Yet as we conclude, *infra*, at 621–622, that is all the record in this case shows.

[2] 26 Stat. 209, as amended, 15 U. S. C. § 1.

Before explaining why we disagree with the ultimate conclusion of the courts below, we first describe the tying arrangement and then summarize the findings on the economic-power issue.

## I

Only the essential features of the arrangement between the parties need be described. Fortner is a corporation which was activated by an experienced real estate developer for the purpose of buying and improving residential lots. One petitioner, United States Steel Corp., operates a "Home Division" which manufactures and assembles components of prefabricated houses; the second petitioner, the "Credit Corp.," is a wholly owned subsidiary, which provides financing to customers of the Home Division in order to promote sales. Although their common ownership and control make it appropriate to regard the two as a single seller, they sell two separate products—prefabricated houses and credit. The credit extended to Fortner was not merely for the price of the homes. Petitioners agreed to lend Fortner over $2,000,000 in exchange for Fortner's promise to purchase the components of 210 homes for about $689,000. The additional borrowed funds were intended to cover Fortner's cost of acquiring and developing the vacant real estate, and the cost of erecting the houses.

The impact of the agreement on the market for the tied product (prefabricated houses) is not in dispute. On the one hand, there is no claim—nor could there be—that the Home Division had any dominance in the prefabricated housing business. The record indicates that it was only moderately successful, and that its sales represented a small fraction of the industry total.[3] On the other hand, we have already held that the dollar value of the sales to respondent was sufficient to meet the "not insubstantial" test described in earlier cases. See 394 U. S., at 501-502. We therefore confine our attention to the source of the tying arrangement—petitioners' "economic power" in the credit market.

## II

The evidence supporting the conclusion that the Credit Corp. had appreciable economic power in the credit market relates to four propositions: (1) petitioner Credit Corp. and the Home Division were owned by one of the Nation's largest corporations; (2) petitioners entered into tying arrangements with a significant number of customers in addition to Fortner; (3) the Home Division charged respondent a noncompetitive price for its prefabricated homes; and (4) the financing provided to Fortner was "unique," primarily because it covered 100% of Fortner's acquisition and development costs.

The Credit Corp. was established in 1954 to provide financing for customers of the Home Division. The United States Steel Corp. not only provided the equity capital, but also allowed the Credit Corp. to use its credit in order to borrow money from banks at the prime rate. Thus, although the Credit Corp. itself was not a particularly large company, it was supported by a corporate parent with great financial strength.

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[3] In 1960, for example, the Home Division sold a total of 1,793 houses for $6,747,353. There were at least four larger prefabricated home manufacturers, the largest of which sold 16,804 homes in that year. In the following year the Home Division's sales declined while the sales of each of its four principal competitors remained steady or increased.

The Credit Corp.'s loan policies were primarily intended to help the Home Division sell its products.[4] It extended credit only to customers of the Home Division, and over two-thirds of the Home Division customers obtained such financing. With few exceptions, all the loan agreements contained a tying clause comparable to the one challenged in this case. Petitioner's home sales in 1960 amounted to $6,747,353. Since over $4,600,000 of these sales were tied to financing provided by the Credit Corp.,[5] it is apparent that the tying arrangement was used with a number of customers in addition to Fortner.

The least expensive house package that Fortner purchased from the Home Division cost about $3,150. One witness testified that the Home Division's price was $455 higher than the price of comparable components in a conventional home; another witness, to whom the District Court made no reference in its findings, testified that the Home Division's price was $443 higher than a comparable prefabricated product. Whether the price differential was as great as 15% is not entirely clear, but the record does support the conclusion that the contract required Fortner to pay a noncompetitive price for the Home Division's houses.

The finding that the credit extended to Fortner was unique was based on factors emphasized in the testimony of Fortner's expert witness, Dr. Masten, a professor with special knowledge of lending practices in the Kentucky area. Dr. Masten testified that mortgage loans equal to 100% of the acquisition and development cost of real estate were not otherwise available in the Kentucky area; that even though Fortner had a deficit of $16,000, its loan was not guaranteed by a shareholder, officer, or other person interested in its business; and that the interest rate of 6% represented a low rate under prevailing economic conditions.[6] Moreover, he explained that the stable price levels at the time made the risk to the lender somewhat higher than would have been the case in a period of rising prices. Dr. Masten concluded that the terms granted to respondent by the Credit Corp. were so unusual that it was almost inconceivable that the funds could have been acquired from any other source. It is a fair summary of his testimony, and of the District Court's findings, to say that the loan was unique because the lender accepted such a high risk and the borrower assumed such a low cost.

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[4] After reviewing extensive evidence taken from the files of the Credit Corp., including a memorandum stating that "our only purpose in making the loan . . . is shipping houses," the District Court expressly found "that the Credit Corporation was not so much concerned with the risks involved in loans but whether they would help sell houses." App. 1588–1589.

[5] This figure is not stated in the District Court's findings; it is derived from the finding of total sales and the finding that 68% of the sales in 1960 were made to dealers receiving financial assistance from the Credit Corp. See *id.*, at 1589–1590.

The District Court also found that banks and federally insured savings and loan associations generally were prohibited by law from making 100% land acquisition and development loans, and "that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved." App. 1596.

Accordingly, the District Court concluded "that all of the required elements of an illegal tie-in agreement did exist since the tie-in itself was present, a not insubstantial amount of interstate commerce in the tied product was restrained and the Credit Corporation did possess sufficient economic power or leverage to effect such restraint." *Id.*, at 1602.

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[6] The prime rate at the time was 5% or 5½%.

## III

Without the finding that the financing provided to Fortner was "unique," it is clear that the District Court's findings would be insufficient to support the conclusion that the Credit Corp. possessed any significant economic power in the credit market.

Although the Credit Corp. is owned by one of the Nation's largest manufacturing corporations, there is nothing in the record to indicate that this enabled it to borrow funds on terms more favorable than those available to competing lenders, or that it was able to operate more efficiently than other lending institutions. In short, the affiliation between the petitioners does not appear to have given the Credit Corp. any cost advantage over its competitors in the credit market. Instead, the affiliation was significant only because the Credit Corp. provided a source of funds to customers of the Home Division. That fact tells us nothing about the extent of petitioners' economic power in the credit market.

The same may be said about the fact that loans from the Credit Corp. were used to obtain house sales from Fortner and others. In some tying situations a disproportionately large volume of sales of the tied product resulting from only a few strategic sales of the tying product may reflect a form of economic "leverage" that is probative of power in the market for the tying product. If, as some economists have suggested, the purpose of a tie-in is often to facilitate price discrimination, such evidence would imply the existence of power that a free market would not tolerate.[7] But in this case Fortner was only required to purchase houses for the number of lots for which it received financing. The tying product produced no commitment from Fortner to purchase varying quantities of the tied product over an extended period of time. This record, therefore, does not describe the kind of "leverage" found in some of the Court's prior decisions condemning tying arrangements.[8]

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[7] See Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957).

The fact that Fortner—and presumably other Home Division customers as well—paid a noncompetitive price for houses also lends insufficient support to the judgment of the lower court. Proof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing was unusually inexpensive[9] and that the price for the entire package was equal to, or below, a competitive price. And this possibility is equally strong even though a number of Home Division customers made a package purchase of homes and financing.[10]

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[8] See *e. g., United Shoe Machinery* v. *United States,* 258 U. S. 451; *International Business Machines* v. *United States,* 298 U. S. 131; *International Salt Co.* v. *United States,* 332 U. S. 392. In his article in the 1969 Supreme Court Review 16, Professor Dam suggests that this kind of leverage may also have been present in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1.

[9] Fortner's expert witness agreed with the statement:

"The amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. The other relevant factors include the rate of interest charged, whether the lender discounts the amount loaned or charges service for [*sic*] other fees and maturity in terms of repayment." App. 1686.

[10] Relying on *Advance Business Systems & Supply Co.* v. *SCM Corp.,* 415 F. 2d 55 (CA4 1969), cert. denied, 397 U. S. 920, Fortner contends that acceptance of the package by a significant number of customers is itself sufficient to prove the seller's economic power. But this approach depends on the absence of other explanations for the willingness of buyers to purchase the package. See 415 F. 2d, at 68. In the *Northern Pacific* case, for instance, the Court explained:

"The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim

The most significant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding of illegality in prior cases. Thus, the statutory grant of a patent monopoly in *International Salt Co.* v. *United States,* 332 U. S. 392; the copyright monopolies in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, and *United States* v. *Loew's Inc.,* 371 U. S. 38; and the extensive land holdings in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1,[11] represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power.[12]

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that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper. So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition." 356 U. S., at 7-8 (footnote omitted).

As this passage demonstrates, this case differs from *Northern Pacific* because use of the tie-in in this case can be explained as a form of price competition in the tied product, whereas that explanation was unavailable to the Northern Pacific Railway.

[11] The Court in *Northern Pacific* concluded that the railroad "possessed substantial economic power by virtue of its extensive landholdings" and then described those holdings as follows:

"As pointed out before, the defendant was initially granted large acreages by Congress in the several North-western States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities." *Id.,* at 7.

[12] "Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into antitrust law on the theory that the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anti-

As the Court plainly stated in its prior opinion in this case, these decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product. See 394 U. S., at 502–503. They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.[13] In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

Without any such advantage differentiating his product from that of his competitors, the seller's product does not

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competitive consequences." *United States* v. *Loew's Inc.*, 371 U. S. 38, 46.

[13] "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." 394 U. S., at 504.

Professor Dam correctly analyzed the burden of proof imposed on Fortner by this language. In his article in the 1969 Supreme Court Review 25–26, he reasoned:

"One important question in interpreting the *Fortner* decision is the meaning of this language. Taken out of context, it might be thought to mean that, just as the 'host of tying arrangements' was 'compelling evidence' of 'great power' in *Northern Pacific,* so the inclusion of tie-in clauses in contracts with 'any appreciable numbers of buyers' establishes market power. But the passage read in context does not warrant this interpretation. For the immediately preceding sentence makes clear that market power in the sense of power over price must still exist. If the price could have been raised but the tie-in was demanded in lieu of the higher price, then—and presumably only then—would the requisite economic power exist. Thus, despite the broad language available for quotation in later cases, the treatment of the law on market power is on close reading not only consonant with the precedents but in some ways less far-reaching than *Northern Pacific* and *Loew's,* which could be read to make actual market power irrelevant." (Footnotes omitted.)

have the kind of uniqueness considered relevant in prior tying-clause cases.[14] The Court made this point explicitly when it remanded this case for trial:

> "We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors." 394 U. S., at 505.

An accompanying footnote explained:

> "Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e. g., International Salt; Loew's,* or physical, as when the product is land, *e. g., Northern Pacific.* It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." *Id.,* at 505 n. 2.

Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. Yet this is, in substance, all that the record in this case indicates.

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[14] One commentator on *Fortner I* noted:

"The Court's uniqueness test is adequate to identify a number of situations in which this type of foreclosure is likely to occur. Whenever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price of its nearest substitute, the seller has the opportunity to impose a tie to some other good." Note, The Logic of Foreclosure: Tie-In Doctrine after *Fortner* v. *U. S. Steel,* 79 Yale L. J. 86, 93–94 (1969).

The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses.[15] Without any evidence that the Credit Corp. had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation.

The judgment of the Court of Appeals is reversed.

*So ordered.*

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur in the Court's opinion and write only to emphasize what the case before us does *not* involve; I join on the basis of my understanding of the scope of our holding. Today's decision does not implicate ordinary credit sales of only a single product and which therefore cannot constitute a tying arrangement subject to *per se* scrutiny under § 1 of the Sherman Act. In contrast to such transactions, we are dealing here with a peculiar arrangement expressly found by the Court in *Fortner I* to involve two separate products sold by two separate corporations. *Fortner Enterprises* v. *United States Steel Corp.,* 394 U. S. 495, 507 (1969). Consequently, I read the Court's assumption that a tie-in existed in this case, required as it is by the law of the case, to cast no doubt on the legality of credit financing by manufacturers or distributors.

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[15] The opinion of the Court in *Fortner I* notes that smaller companies might not have the "financial strength to offer credit comparable to that provided by larger competitors under tying arrangements." 394 U. S., at 509. Fortner's expert witness was unaware of the financing practices of competing sellers of prefabricated homes, App. 1691–1692, but there is nothing to suggest that they were unable to offer comparable financing if they chose to do so.

# CODD, POLICE COMMISSIONER, CITY OF NEW YORK, ET AL. v. VELGER

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75-812. Argued December 1, 1976—Decided February 22, 1977

Respondent's claim under the Due Process Clause of the Fourteenth Amendment that before being dismissed from his nontenured position as a city policeman he was entitled to a hearing due to the stigmatizing effect of certain information in his personnel file about a suicide attempt while he was a police trainee *held* to be defeated by the failure of respondent or the courts below to raise a question about the substantial accuracy of the report of the suicide attempt. Only if the employer is alleged to have created and disseminated a false and defamatory impression about the employee in connection with his termination, or a trial court so finds, is such a hearing required.

525 F. 2d 334, reversed.

*W. Bernard Richland* argued the cause and filed a brief for petitioners.

*Sam Resnicoff* argued the cause for respondent. With him on the brief was *Edward M. Rappaport*.

PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U. S. C. § 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal from a position with the Penn-Central Railroad Police Department, and that it had also prevented him from finding other employment of a similar nature for which his scores on numerous examinations otherwise qualified him.[1]

The case came on for a bench trial before Judge Werker, who, in the words of his opinion on the merits, found "against plaintiff on all issues." He determined that the only issue which survived Judge Gurfein's ruling on the earlier motions was whether petitioners, in discharging respondent had "imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities." After discussing the evidence bearing upon this issue, Judge Werker concluded that "[i]t is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants."

Among the specific findings of fact made by the District Court was that an officer of the Penn-Central Railroad

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[1] Respondent's amended complaint did not seek a delayed *Roth* hearing to be conducted by his former employer at which he would have the opportunity to refute the charge in question. *Board of Regents* v. *Roth,* 408 U. S. 564, 573 (1972). The relief he sought was premised on the assumption that the failure to accord such a hearing when it should have been accorded entitled him to obtain reinstatement and damages resulting from the denial of such hearing. We therefore have no occasion to consider the allocation of the burden of pleading and proof of the necessary issues as between the federal forum and the administrative hearing where such relief is sought.

Police Department was shown the City Police Department file relating to respondent's employment, upon presentation of a form signed by respondent authorizing the release of personnel information. From an examination of the file, this officer "gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt." The Penn-Central officer tried to verify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In rendering judgment against the respondent, the court also found that he had failed to establish "that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers."

Respondent successfully appealed this decision to the Court of Appeals for the Second Circuit. That court held that the finding of no stigma was clearly erroneous. It reasoned that the information about the apparent suicide attempt was of a kind which would necessarily impair employment prospects for one seeking work as a police officer. It also decided that the mere act of making available personnel files with the employee's consent was enough to place responsibility for the stigma on the employer, since former employees had no practical alternative but to consent to the release of such information if they wished to be seriously considered for other employment. *Velger* v. *Cawley*, 525 F. 2d 334 (1975).

We granted certiorari, *sub nom. Cawley* v. *Velger,* 427 U. S. 904 (1976), and the parties have urged us to consider whether the report in question was of a stigmatizing nature, and whether the circumstances of its apparent dissemination were such as to fall within the language of *Board of Regents* v. *Roth,* 408 U. S. 564, 573 (1972) and *Bishop* v. *Wood,* 426 U. S. 341 (1976). We find it unnecessary to reach these issues, however, because of respondent's failure to allege or prove one essential element of his case.

Assuming all of the other elements necessary to make out a claim of stigmatization under *Roth* and *Bishop,* the remedy mandated by the Due Process Clause of the Fourteenth Amendment is "an opportunity to refute the charge." 408 U. S., at 573. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name," *id.*, at 573 n. 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report of the apparent suicide attempt was substantially false. Neither the District Court nor the Court of Appeals made any such finding. When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing.

Where the liberty interest involved is that of conditional freedom following parole, we have said that the hearing required by the Due Process Clause in order to revoke parole must address two separate considerations. The first is whether the parolee in fact committed the violation with which he is charged, and the second is whether if he did commit the act his parole should, under all the circumstances, therefore be revoked. *Morrissey* v. *Brewer,* 408 U. S. 471, 479–480 (1972); *Gagnon* v. *Scarpelli,* 411 U. S. 778, 784 (1973). The fact that there was no dispute with respect to the commission of the act would not necessarily obviate the need for a hearing on the issue of whether the commission of the act warranted the revocation of parole.

But the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him. For the contemplated hearing does not embrace any determination analogous to the "second step" of the parole revocation proceeding, which would in effect be a determination of whether or not, conceding that the report were true, the employee was properly refused re-employment. Since the District Court found that respondent had no Fourteenth Amendment property interest in continued employment,[2] the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required. *Roth, supra; Bishop, supra.*

Our decision here rests upon no overly technical application of the rules of pleading. Even conceding that the respondent's termination occurred solely because of the report of an apparent suicide attempt, a proposition which is certainly not crystal clear on this record, respondent has at no stage of this litigation affirmatively stated that the "attempt" did not take place as reported. The furthest he has gone is a suggestion by his counsel that "[i]t might have been all a mistake, [i]t could also have been a little horseplay." This is not enough to raise an issue about the substantial accuracy of the report. Respondent has therefore made out no claim under the Fourteenth Amendment that he was harmed by the denial of a hearing, even were we to accept in its entirety the determination by the Court of Appeals that the creation and disclosure of the file report otherwise amounted to stigmatization within the meaning of *Board of Regents* v. *Roth, supra.*

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[2] The Court of Appeals did not pass on this "property interest" question. Respondent has not urged it as an alternative basis for affirming the judgment of that court, and indeed has all but conceded in his brief that the District Court's interpretation of the relevant New York cases is correct in this respect. Brief for Respondent 14. The opinion of the District Court on this point reflects a proper understanding of *Roth, supra,* and of *Perry* v. *Sindermann,* 408 U. S. 593 (1972), and we see no reason to disturb its application of those cases to particular facets of the New York law of entitlement to public job tenure. *Id.,* at 602 n. 7.

The judgment of the Court of Appeals is reversed with instructions to reinstate the judgment of the District Court.

*So ordered.*

MR. JUSTICE BLACKMUN, concurring.

I join the Court's *per curiam* opinion, but I emphasize that in this case there is no suggestion that the information in the file, if true, was not information of a kind that appropriately might be disclosed to prospective employers. We therefore are not presented with a question as to the limits, if any, on the disclosure of prejudicial, but irrelevant, accurate information.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent from today's holding substantially for the reasons expressed by my Brother STEVENS in Part I of his dissent, despite my belief that the Court's ruling is likely to be of little practical importance.

Respondent alleged that he suffered deprivation of his liberty when petitioners terminated his employment and retained stigmatizing information in his employment file, information later disseminated to a prospective employer. Under *Board of Regents* v. *Roth,* 408 U. S. 564, 573 (1972), respondent therefore was entitled to a timely pretermination hearing. The Court today reaffirms *Roth,* but holds that respondent's retrospective claim for damages and equitable relief under 42 U. S. C. § 1983 must be denied because "at no stage of this litigation,"[1] *ante,* at 628, has he "raise[d] an issue about the substantial accuracy of the report" in question.[2] *Ibid.* That holding, I believe, erroneously allocates the burden of introducing truth or falsity into the lawsuit.

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[1] The Court fortunately makes clear that it is not calling for an

Twice before this Term we have reasserted the principle that once a plaintiff establishes that another has interfered with his constitutional rights, the burden shifts to the wrongdoer to demonstrate that any such interference was strictly harmless. *Arlington Heights* v. *Metropolitan Housing Dev. Corp., ante,* at 270–271, n. 21; *Mt. Healthy City Board of Ed.* v. *Doyle, ante,* at 287. In this case respondent met his initial burden, for he adequately alleged that he has suffered injury to his reputation and job prospects in conjunction with a discharge from public employment, and that petitioners failed to comply with *Roth*'s resulting requirement of a due process hearing. I agree that the District Court remains open to a determination that petitioners' denial of respondent's due process rights produced little[3] or no compensable injury, since, even had the

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"overly technical application of the rules of pleading." *Ante,* at 628. Indeed, there may be instances where a plaintiff reasonably cannot be held responsible for failing to *plead* falsity in his complaint. For example, in this instance, respondent cannot be faulted for his failure to plead falsity, since his complaint alleged that he "does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file." App. 51a. Thus, his undoing occurred, according to the Court, in the later "stage[s] of this litigation," when he learned of the specific contents of the employment file but made little effort "to raise an issue about the substantial accuracy of the report." *Ante,* at 628.

[2] Respondent has never argued that the disseminated information, while truthful, was not properly informative of his role as policeman or employee. As MR. JUSTICE BLACKMUN notes, *ante,* at 629, the Court's opinion, therefore, does not address—and does not foreclose—the question of whether the Constitution imposes separate constraints upon the collection and dissemination of stigmatizing information that bears only an attenuated relationship to one's job performance or qualifications.

[3] A determination of truthful material would preclude an award of damages for false stigmatization of plaintiff's reputation. Nonetheless, because of petitioners' failure to satisfy *Roth*'s requirement of a pretermi-

hearing properly been held, the stigmatizing charges would have remained unrefuted. But any such allegation and proof of truthful material properly is a defense to be raised by the defendant wrongdoer—subject, of course, to appropriate disposition of the case by way of summary judgment should the employee thereupon fail to contest the "substantial accuracy of the report." Since petitioners interposed no such defense in this case, respondent's due process claim should be upheld.

I also agree with Part III of MR. JUSTICE STEVENS' dissenting opinion, and I would therefore remand this case to the Court of Appeals for further proceedings.

MR. JUSTICE STEWART, dissenting.

Although sharing generally the views expressed in the Court's opinion, I agree with Part III of MR. JUSTICE STEVENS' dissenting opinion, and I would for that reason remand this case to the Court of Appeals for further proceedings.

MR. JUSTICE STEVENS, dissenting.

There are three aspects of the Court's disposition of this case with which I disagree. First, I am not persuaded that a person who claims to have been "stigmatized" by the State without being afforded due process need allege that the charge against him was false in order to state a cause of action under 42 U. S. C. § 1983. Second, in my opinion the Court should not assume that this respondent was stigmatized, because the District Court's contrary finding was not

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nation due process hearing, respondent still would have suffered deprivation of an established constitutional right. As with any infringement of an intangible constitutional right, *e. g., Nixon* v. *Herndon*, 273 U. S. 536, 540 (1927) (damages allowable for unlawful denial of the right to vote), a jury should be permitted to decide whether to fix and award damages—perhaps only nominal—for the very denial of a timely due process forum where a stigmatized individual could participate in the process of attempting to clear his name.

clearly erroneous. Third, I would remand the case to the Court of Appeals to consider the claim that respondent had a property interest in his job, since that court did not decide this issue.

## I

The Court holds that respondent's failure to allege falsity negates his right to damages for the State's failure to give him a hearing. This holding does not appear to rest on the view that a discharged employee has no right to a hearing unless the charge against him is false.[1] If it did, it would represent a radical departure from a principle basic to our legal system—the principle that the guilty as well as the innocent are entitled to a fair trial.[2] It would also be a departure from *Board of Regents* v. *Roth,* 408 U. S. 564, 572–575. In that case the Court concluded that a person is deprived of liberty when the State's refusal to rehire him destroys his "good name" in the community or forecloses him from practicing his profession. A hearing may establish that such a deprivation of liberty is warranted because the charges are correct. But *Bishop* v. *Wood,* 426 U. S. 341, 349, makes it clear that the truth or falsity of the charge "neither enhances nor diminishes [the employee's] claim that his constitutionally protected interest in liberty has been impaired." If the charge, whether true or false, involves a deprivation of liberty, due process must accompany the deprivation. And normally, as *Roth* plainly states, the Constitution mandates "a full prior hearing." 408 U. S., at 574.[3]

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[1] The Court indicates, *ante,* at 625 n. 1, that its holding is premised on the form of relief sought. If falsity were a precondition to the existence of a constitutional violation, the form of relief would be irrelevant. For to grant any relief, the federal court would first have to determine that a violation had occurred, which would in turn require a finding of falsity. I recognize that there is authority for the view that falsity is an element of the violation. See *Sims* v. *Fox,* 505 F. 2d 857, 863–864 (CA5 1974) (en banc), cert. denied, 421 U. S. 1011. Cf. *Paul* v. *Davis,* 424 U. S. 693, 709–710 (describing *Board of Regents* v. *Roth,* 408 U. S. 564, as involving government "defamation").

[2] "When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension.

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 179 (Douglas, J., concurring).

This hearing must include consideration of whether the charge, if true, warrants discharge. The discharge itself is part of the deprivation of liberty against which the employee is entitled to defend. Release of unfavorable information can damage an employee's reputation and employment prospects, but far greater injury is caused by an official determination, based on such information, that the employee is unfit for public employment. Indeed the Court has held that an injury to reputation had not resulted in a deprivation of liberty *because* it was not associated with the termination of employment. *Paul* v. *Davis*, 424 U. S. 693, 709–710. Since allowing the employee to keep his job would eliminate (or at least lessen) the loss of liberty, due process requires that the hearing include the issue whether the facts warrant discharge.[4] In short, the purpose of the hearing, as is true of any other hearing which must precede a deprivation of liberty, is twofold: first, to establish the truth or falsity of the charge, and second, to provide a basis for deciding what action is warranted by the facts.[5] Even when it is perfectly clear that the charge is true, the Constitution requires that procedural safeguards be observed. Cf. *Groppi* v. *Leslie*, 404 U. S. 496, 503. For these reasons, I disagree with the Court's assertion that the purpose of the hearing is "solely" to provide the person with an opportunity to clear his name.[6]

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[3] As I read Part II of *Roth, supra,* at 572–575, which discusses the kind of "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment, there are two quite different interests which may be implicated when a nontenured employee is discharged. First, the Court, 408 U. S., at 573, considers the individual's interest in " 'good name, reputation, honor, or integrity.' " It is with respect to this reputational interest that the Court indicates, *id.,* at 573 n. 12, that a name-clearing hearing is constitutionally required. That footnote does not tell us whether that hearing must precede the injury to reputation, and surely does not imply that such a hearing is the only remedy available to an employee whose constitutional right to due process has been violated.

Second, in the ensuing paragraphs, the *Roth* opinion considers the individual interest in avoiding "a stigma or other disability" that forecloses employment opportunities. With respect to this interest, the Court rather clearly indicates, *id.,* at 574, that no such stigma may be imposed without a "full prior hearing."

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[4] Similarly, since disclosure of the charges is also part of the deprivation of liberty, *Bishop* v. *Wood*, 426 U. S. 341, 348, the hearing could properly include the issue whether the charges should remain confidential, or whether the written record should at least be modified to reflect a less one-sided description of the events.

[5] The Court states, *ante*, at 627:

"Where the liberty interest involved is that of conditional freedom following parole, we have said that the hearing required by the Due Process Clause in order to revoke parole must address two separate considerations. The first is whether the parolee in fact committed the violation with which he is charged, and the second is whether if he did commit the act his parole should, under all the circumstances, therefore be revoked. *Morrissey* v. *Brewer*, 408 U. S. 471, 479–480 (1972); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 784 (1973). The fact that there was no dispute with respect to the commission of the act would not necessarily obviate the need for a hearing on the issue of whether the commission of the act warranted the revocation of parole."

This reasoning is equally applicable to a decision to revoke a person's employment for a stigmatizing reason. The fact that there is no dispute with respect to the commission of the act involved does not necessarily obviate the need for a hearing on the issue of whether employment should be terminated.

[6] The Court states, *ibid.*, that "the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his

Even, if I agreed with the Court that this was the sole purpose of the hearing, I could not agree with its holding that failure to demonstrate falsity is fatal to the employee's suit. Surely the burden should be on the State to show that failure to provide due process was harmless error because the charges were true. See MR. JUSTICE BRENNAN's dissent, *ante*, p. 629.[7] Moreover, failure to provide a hearing might give rise to damages unrelated to the possible outcome of the hearing.[8]

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employment is *solely* 'to provide the person an opportunity to clear his name.'" (Emphasis added.) Earlier, *ibid.*, the Court states: "Assuming all of the other elements necessary to make out a claim of stigmatization under *Roth* and *Bishop,* the remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge.' 408 U. S., at 573." Of course, in neither *Roth* nor *Bishop* did the Court state or imply that a name-clearing hearing was the *only* remedy mandated by the Constitution.

[7] The Court's contrary approach would produce perverse results when the relief sought by the plaintiff includes an administrative hearing. To establish his right to such relief, the plaintiff would have to plead—and presumably prove—that the charges against him are false. But once it is established that the charges are false, there is no longer any reason to hold an administrative hearing on that subject.

This problem is squarely presented by this case because respondent did request such a hearing. At trial, respondent's counsel made the following statement:

"And therefore, he should be reinstated and he should be given a full hearing, an adversary hearing." App. 93a.

Under modern trial practice, no more formal request was necessary. The amended complaint had requested a declaratory judgment that "the action of defendants in terminating plaintiff's employment without charges and without a hearing [was] in violation of the Constitution . . . ," and had sought "such additional alternative relief as may seem to this Court to be just, proper and equitable." *Id.*, at 55a–56a. And, of course, Fed. Rule Civ. Proc. 54 (c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

[8] See Judge Tone's thoughtful discussion of this problem in *Hostrop* v. *Board of Junior College Dist. 515,* 523 F. 2d 569, 578–580 (CA7 1975).

Today's holding may have the unfortunate effect of encouraging public officials to deny hearings when they feel confident of the correctness of their decision. But, in Mr. Justice Frankfurter's oft-quoted words:

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 171–172 (concurring opinion).

As the last sentence in this quotation demonstrates, if state action has consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty, it is essential that fair procedures be followed for reasons that have nothing to do with the merits of the individual case. Today's holding is only a minor impairment of this principle. But the principle is one that admits of no compromise.

## II

Although the plaintiff does not have the burden of proving that he was discharged for a false reason, if he claims that the discharge deprived him of liberty, he does have the burden of proving that he was stigmatized. The District Court found that respondent did not meet that burden in this case. Under the proper standard of appellate review,[9] I cannot say that

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[9] The general principle governing review of a District Court's findings of fact is clear:

"In applying the clearly erroneous standard to the findings of a disfinding was clearly erroneous, particularly when the record discloses that the respondent did not prove exactly what the unfavorable information in his file was, or exactly what information was disseminated to others.

The District Court found that unfavorable information from respondent's police record reached a prospective employer in only one instance. In that instance, a private employer was allowed to see the file with respondent's permission. The private employer then discharged respondent, who was on probationary status. The District Court expressly found that no information was released to any government agency to which respondent had applied. App. 113a–114a.[10] Thus, as far

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trict court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52 (a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)." *Zenith Corp.* v. *Hazeltine*, 395 U. S. 100, 123.

[10] The Court of Appeals found "every indication" that respondent would have obtained a job except for the contents of his file. *Velger* v. *Cawley*, 525 F. 2d 334, 335 (CA2 1975). Apart from the one instance of disclosure found by the District Court, this conclusion seems to have been based on an incident in which respondent was told he would be hired if his character investigation was satisfactory, and on the fact that he had passed numerous civil service examinations and received several job interviews but no jobs. The incident referred to by the Court of Appeals proves nothing about the effect of the contents of the file, since respondent testified that he refused to give that employer permission to inspect the file. App. 81a. The fact that respondent was unsuccessful in obtaining a job, despite numerous attempts, good examination scores, and several interviews, does not prove that he was stigmatized by information in his file since the District Court found that those employers had not had access to the file. Entirely apart from the file, there may have been

as the past effects of the unfavorable file are concerned, we have only the finding that one employer discharged respondent on the basis of the information. This does not in itself constitute a "stigma" as that term is used in *Board of Regents* v. *Roth*, 408 U. S. 564.[11]

The Court of Appeals also relied on the nature of the information itself as demonstrating that future release to employers would bar respondent from obtaining employment. *Velger* v. *Cawley*, 525 F. 2d 334, 336 (CA2 1975). Notwithstanding the broad discovery authorized by the Federal Rules of Civil Procedure, respondent failed to prove precisely what adverse information was in his personnel file. The revolver incident occurred sometime before respondent's 21st birthday, when he was still a trainee; as his counsel points out, it might well have been "a little horseplay"; and his subsequent conduct as a police officer was presumably good. There was no finding that the revolver incident was the official reason for discharge.[12] On this record, it cannot be said as a matter of law

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factors which made respondent less attractive to employers than other available applicants.

[11] *Roth* recognizes two types of stigma. See n. 3, *supra*. First, the State's action "might seriously damage [the employee's] standing and associations in his community." 408 U. S., at 573. The release of information to a single employer at the employee's request can hardly be considered an injury to the employee's community standing. Second, the State's action might have the effect of "foreclos[ing] his freedom to take advantage of other employment opportunities." *Ibid.* It is not enough, however, to make him "somewhat less attractive to some other employers," for that "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" *Id.*, at 574 n. 13. The fact that one employer considered the information a bar to employment does not necessarily mean that most other employers would have the same reaction. In short, on the basis of the entire record the District Court could find that this single incident of disclosure and its aftermath do not establish a sufficiently grievous harm to reputation to constitute a deprivation of liberty.

[12] The District Court did find that a private employer who inspected the file had "gleaned" from the file that this was the reason for the discharge.

that prospective employers would reject respondent's attempts to explain this incident and would uniformly refuse to hire him.

In the performance of our appellate function "[i]t is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" *United States* v. *Real Estate Boards,* 339 U. S. 485, 495–496.

I conclude that the Court of Appeals was incorrect in setting aside the District Court's findings of fact. Since those findings do not establish the existence of a stigma, the Court of Appeals erred in holding on this basis that a hearing was required.

## III

It is possible, however, that a hearing was required because the discharge deprived respondent of a property interest. The District Court rejected the claim that he had an entitlement to his job as a matter of state law, but the Court of Appeals found it unnecessary to reach this issue. I believe there is enough merit to the property claim to justify a remand to the Court of Appeals with directions to consider it.

In *Bishop* v. *Wood,* the plaintiff's job was "terminable at the will of either party irrespective of the quality of performance by the other party." 426 U. S., at 345 n. 9, and accompanying text. There was no right to state judicial review. In this case, however, the state law may afford the employee some protection against arbitrary discharge. According to the state case cited by Judge Gurfein, App. 37a, the Police Commissioner may terminate only "unsatisfactory employee[s],"[13] and his determination is reviewable in the state courts on an "arbitrary and capricious" standard. *In re Going* v. *Kennedy,* 5 App. Div. 2d 173, 176–177, 170 N. Y. S. 2d 234, 237–238 (1958), aff'd, 5 N. Y. 2d 900, 156 N. E. 2d 711 (1959); see *In re Talamo* v. *Murphy,* 38 N. Y. 2d 637, 345 N. E. 2d 546 (1976).[14] Unlike *Bishop,* in which a hearing would have been pointless because nothing plaintiff could prove would entitle him to keep his job, in this case the plaintiff may have had a right to continued employment if he could rebut the charges against him.[15]

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[13] In *Arnett* v. *Kennedy,* 416 U. S. 134, the employee could be discharged only for "'such cause as will promote the efficiency of [the] serv-

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ice,'" *id.,* at 151–152 (opinion of REHNQUIST, J.). Six Members of the Court were satisfied that that standard was sufficient to create an entitlement protected by the Due Process Clause. This respondent had a right to keep his job if he proved "satisfactory." I do not know whether the difference between Kennedy's entitlement and this respondent's is of constitutional dimensions, but the similarity to *Arnett* is sufficient to justify a remand.

[14] In *In re Going* v. *Kennedy,* the Appellate Division noted that the appointing officer had been delegated the authority to terminate "unsatisfactory employee[s]," and compared the probation period to an additional employment test designed to determine whether an employee is "able to meet all requirements or expectations in filling the position." 5 App. Div. 2d, at 178, 170 N. Y. S. 2d, at 239. The New York Court of Appeals, citing *Going* with approval, applied the "arbitrary and capricious" standard in *Talamo* to determine whether there was a "rational basis" for the police commissioner's decision to discharge a probationary police officer. 38 N. Y. 2d, at 639, 345 N. E. 2d, at 547. See also *In re Farrell* v. *New York City Police Dept.,* 44 App. Div. 2d 782, 355 N. Y. S. 2d 99 (1974), aff'd, 37 N. Y. 2d 843, 340 N. E. 2d 469 (1975).

[15] Cf. *Perry* v. *Sindermann,* 408 U. S. 593, 601:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Even if respondent's entitlement is a sufficient property interest to trigger due process, he is not necessarily entitled to an elaborate adversary hearing. "Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer,* 408 U. S. 471, 481. But *at least* respondent would be entitled to notice of the charge against him and an opportunity to respond, if only in writing.

By directing the Court of Appeals to reinstate the District Court judgment, the Court summarily rejects this claim without the benefit of briefing or oral argument on the point.[16] I would remand the case to the Court of Appeals for consideration of this claim.

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[16] Respondent did not abandon that claim in this Court. The portion of his brief cited by the majority, *ante,* at 628 n. 2, concerns the issue whether state law itself requires a hearing, see Brief for Respondent 14; this is an entirely different issue than whether state law creates a sufficient entitlement to trigger a federal right to a hearing. To preserve his right to a remand, the party prevailing below need not argue the merits of claims the lower court failed to reach. See generally *Dandridge* v. *Williams,* 397 U. S. 471, 475–476, n. 6.

# UNITED STATES *v.* BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 76-489. Decided February 22, 1977

A local district court's inquiry in an action under § 5 of the Voting Rights Act of 1965, claiming that new voting procedures of a State or political subdivision thereof fail to comply with § 5 procedures, is limited to determining whether a voting requirement is covered by § 5 but has not been subjected to the required federal scrutiny. *Allen* v. *State Board of Elections,* 393 U. S. 544; *Perkins* v. *Mathews,* 400 U. S. 379; *Connor* v. *Waller,* 421 U. S. 656. Such limitation inheres in Congress' determination that only the District Court for the District of Columbia has jurisdiction to consider the issue whether a proposed change discriminates on account of race and that other district courts may consider only § 5 "coverage" questions. Hence, here the District Court for the Southern District of Mississippi, in an action by the Attorney General under § 5 challenging a redistricting plan submitted to him by a Mississippi county and to which he had objected, erred in deciding that such plan was unconstitutional and that a new plan submitted to the Attorney General as ordered by the court but not approved by him was constitutional, and the court should have determined only whether the county could be enjoined from holding elections under a new plan because it had not been cleared under § 5.

Reversed and remanded.

PER CURIAM.

The motion of Eddie Thomas et al. for leave to file a brief, as *amici curiae,* is granted.

In November 1970, the Board of Supervisors of Warren County, Miss., submitted a county redistricting plan to the Attorney General for his approval under § 5 of the Voting Rights Act of 1965.[1] The new plan was to replace a plan in effect since 1929. After requesting and receiving additional information, the Attorney General entered an objection to the plan. Despite this objection, the Board held elections in 1971 pursuant to the 1970 plan. After the elections, the Board sought reconsideration of the objection. The Attorney General refused to withdraw the objection and in 1973 filed a complaint, pursuant to § 5, in the District Court for the Southern District of Mississippi. The complaint alleged that the Attorney General's objection to the 1970 redistricting plan rendered that plan unenforceable under § 5, and that the election districts in effect prior to the 1970 redistricting were malapportioned under the Fourteenth Amendment. Three forms of relief were requested: (1) a declaration that implementation of the 1970 plan violated § 5; (2) an injunction against implementing the 1970 plan or any other new plan until there had been compliance with one

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[1] Section 5 requires, in relevant part, that whenever a State or political subdivision covered by the Act seeks to administer "any voting qualifica-

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tion or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Until the District of Columbia court enters a declaratory judgment to that effect, no person may be denied the right to vote for failure to comply with the new practice or procedure. As an alternative to the requirement of a declaratory judgment, § 5 permits the State or political subdivision to enforce a new voting procedure if the procedure has been first submitted to the Attorney General of the United States and the Attorney General has not, within 60 days, interposed an objection to the proposed change. All actions under § 5 are required to be heard by a three-judge court. Voting Rights Act of 1965, § 5, 79 Stat. 439, 42 U. S. C. § 1973c.

There is no dispute in this case that Warren County is a political subdivision covered by the Act, that realignment of election districts is a voting practice or procedure, and that Warren County has not instituted a declaratory judgment action in the District Court for the District of Columbia.

of the two procedures required by § 5; and (3) an order that a new redistricting plan be developed and implemented after being found acceptable under § 5.

A properly convened three-judge court granted the Government's motion for summary judgment. In its later order implementing that judgment, the court found that because the upcoming 1975 County elections could not be held as scheduled "without abridging rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution," the elections had to be stayed subject to compliance with the procedure set out in the court's order. The order provided that the County submit a redistricting plan to the Attorney General for § 5 review and, if no objection were interposed, that elections then be held in accordance with a stipulated schedule. In the event that the County submitted no plan by a stated deadline, or that the Attorney General objected to a submitted plan, or that a submitted plan contained infirmities with respect to the one-person-one-vote requirements of the Fourteenth Amendment, the court would consider plans prepared by both parties and adopt an appropriate redistricting plan to be used in elections held according to the ordered schedule.

The County then informally submitted two plans to the Attorney General for comment and the Attorney General indicated his reservations concerning the validity of the plans. This impasse continued until the deadline in the court's order, after which time the court directed the parties to file their proposed plans for its consideration. After a hearing, the court adopted one of the plans prepared by the County despite the fact that the plan had not been approved pursuant to § 5 procedures. The court found that the adopted plan "neither dilutes black voting strength nor is deficient in one-man, one-vote considerations." It ordered that the county's districts be reorganized according to the plan and that elections be held. The United States appealed. This

Court has jurisdiction under 42 U. S. C. § 1973c and 28 U. S. C. § 1253.

Section 5 provides for two alternative methods by which a State or political subdivision covered by the Act may satisfy the requirement of federal scrutiny of changes in voting procedures. First, the State or political subdivision may institute an action in the District Court for the District of Columbia for a declaratory judgment that the proposed change does not have the purpose or effect of abridging the right to vote on account of race; second, it may submit the proposed change to the Attorney General. No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him. See n. 1, *supra*. Attempts to enforce changes that have not been subjected to § 5 scrutiny may be enjoined by any three-judge district court in a suit brought by a voter, *Allen* v. *State Board of Elections*, 393 U. S. 544, 554–563 (1969), or by the Attorney General on behalf of the United States, Voting Rights Act of 1965, §§ 12 (d), (f), 42 U. S. C. §§ 1973j (d), (f).

In *Perkins* v. *Matthews*, 400 U. S. 379 (1971), this Court held that the separate procedures of § 5 imposed a limitation on the determinations that may be made by district courts entertaining actions brought to enjoin § 5 violations:

> "What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" 400 U. S., at 385.

Adhering to *Allen*, the Court held that the inquiry of a local district court in a § 5 action against a State or political subdivision is "limited to the determination whether 'a [voting] requirement is covered by § 5, but has not been subjected to the required federal scrutiny.' " 400 U. S., at 383, quoting *Allen* v. *State Board of Elections, supra,* at 561. This holding was subsequently reaffirmed in *Connor* v. *Waller,* 421 U. S. 656 (1975).

*Allen, Perkins,* and *Connor* involved private suits by voters claiming noncompliance with § 5 procedures; we now hold that the same limitations on the inquiry of local district courts apply in § 5 actions brought by the Attorney General. The limitation inheres in Congress' determination that only the District Court for the District of Columbia has jurisdiction to consider the issue of whether a proposed change actually discriminates on account of race and that other district courts may consider § 5 "coverage" questions. See *Allen* v. *State Board of Elections, supra,* at 558–559.

The District Court in this case twice exceeded the permissible scope of its § 5 inquiry. In the order implementing its summary judgment for the United States, the court apparently decided that the 1970 redistricting plan did not comply with the Fifteenth Amendment.[2] In its later Findings of Fact and Conclusions of Law approving a plan submitted to the court by Warren County, the court "proceeded on the premise that if . . . Fifteenth Amendment protections had not been accorded by any plan proposed, the court could have instituted its own plan," and then determined that the County plan "will not lessen the opportunity of black citizens of Warren County to participate in the political process and elect officials of their choice." In both instances the court below erred in deciding the questions of constitutional law;[3] it should have determined only whether Warren County could be enjoined from holding elections under a new redistricting plan because such plan had not been cleared under § 5. Accordingly, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

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[2] The court's order enjoined the holding of the 1975 elections because they could not be held without abridging Fourteenth and Fifteenth Amendment rights. The court did not elaborate, but it appears to have held that Fourteenth Amendment, one-person-one-vote rights would be abridged if the election were conducted under the old districting plan and the Fifteenth Amendment rights of black voters would be violated if the 1970 redistricting plan were used.

*So ordered.*

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[3] Although the record is not clear, the source of the confusion concerning the power of the District Court in this case seems to have arisen from the fact that the Attorney General did not seek merely to enjoin implementation of the 1970 redistricting plan, but also asked the court to enjoin any election until the County had been redistricted in a manner that both met the requirements of the Voting Rights Act and eliminated the malapportionment of the old districts. The malapportionment of the old plan could not, however, be made the subject of a Government suit brought under § 5. The section is addressed only to voting procedures that were not in effect on November 1, 1964. *Beer* v. *United States*, 425 U. S. 130, 138–139 (1976). The allegedly malapportioned districts had existed long before 1964 and were, therefore, not properly before the court in the § 5 action.

## DONOVAN *v.* PENN SHIPPING CO., INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-613. Decided February 22, 1977

A plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted. Hence, where petitioner seaman in his action under the Jones Act for injuries sustained on board ship accepted "under protest" a reduced verdict when the District Court ordered a new trial on damages unless petitioner agreed to a remittitur, the Court of Appeals properly dismissed petitioner's appeal from such order on the ground that a plaintiff cannot "protest" a remittitur he has accepted in an attempt to open it to challenge on appeal.

Certiorari granted; 536 F. 2d 536, affirmed.

PER CURIAM.

The petitioner, while employed by the respondents as a seaman on the SS *Penn Sailor*, slipped on wet paint, injuring his right wrist and elbow. He sued the respondents under the Jones Act, 46 U. S. C. § 688, and obtained a $90,000 verdict at his jury trial. The respondents moved to set aside the verdict as excessive. Fed. Rules Civ. Proc. 50, 59. The District Court granted the motion, and ordered a new trial on damages unless the petitioner agreed to remit $25,000 of the $90,000 award.

After some time the petitioner submitted to the District Court a proposed order stating that he accepted "under protest" the reduced verdict of $65,000, but reserving nonetheless "his right to appeal therefrom." This language was adopted by the District Court in entering a judgment for the petitioner in the amount of $65,000.

The petitioner sought appellate review of the District Court's decision to order a conditional new trial. In so doing he asked the Court of Appeals for the Second Circuit to discard the settled rule that a plaintiff who has accepted a remittitur may not appeal to seek reinstatement of the original verdict. The Court of Appeals refused the petitioner's invitation, and dismissed the appeal. 536 F. 2d 536.

The Court of Appeals properly followed our precedents in holding that a plaintiff cannot "protest" a remittitur he has accepted in an attempt to open it to challenge on appeal. A line of decisions stretching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed. *Kennon* v. *Gilmer,* 131 U. S. 22, 29–30 (1889); *Lewis* v. *Wilson,* 151 U. S. 551, 554–555 (1894); *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52 (1895); *Woodworth* v. *Chesbrough,* 244 U. S. 79, 82 (1917).

There are decisions in the Federal Courts of Appeals that depart from these unbroken precedents. Those decisions held or intimated that a plaintiff who accepts a remittitur "under protest" may challenge on appeal the correctness of the remittitur order. See, *e. g., Bonn* v. *Puerto Rico Int'l Airlines, Inc.,* 518 F. 2d 89, 94 (CA1 1975); *United States* v. *1160.96 Acres of Land,* 432 F. 2d 910 (CA5 1970); *Gorsalitz* v. *Olin Mathieson Chemical Corp.,* 429 F. 2d 1033 (CA5 1970); *Steinberg* v. *Indemnity Ins. Co. of North America,* 364 F. 2d 266 (CA5 1966); *Delta Engineering Corp.* v. *Scott,* 322 F. 2d 11, 15 (CA5 1963). Other decisions have suggested that when entertaining cases pursuant to its diversity jurisdiction, a federal court should look to state practice to determine whether such an appeal is permitted. See *Burnett* v. *Coleman Co.,* 507 F. 2d 726 (CA6 1974); *Manning* v. *Altec, Inc.,* 488 F. 2d 127 (CA6 1973); *Mooney* v. *Henderson Portion Pack Co.,* 334 F. 2d 7 (CA6 1964).

The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law, see *Hanna* v. *Plumer,* 380 U. S. 460, 466–469 (1965); *Byrd* v. *Blue Ridge Rural Electric Coop.,* 356 U. S. 525 (1958), and that law has always prohibited appeals in the situation at bar. The Court of Appeals for the Second Circuit correctly adhered to the consistent rule established by this Court's decisions. In order to clarify whatever uncertainty might exist, we now reaffirm the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted.

The petition for a writ of certiorari is granted, and the judgment is affirmed.

*So ordered.*

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant the petition for certiorari but would have the case argued and given plenary consideration rather than disposed of summarily.

# CONCERNED CITIZENS OF SOUTHERN OHIO, INC., ET AL. *v.* PINE CREEK CONSERVANCY DISTRICT ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 76-667. Decided February 22, 1977

Where the District Court rejected all of appellants' challenges to the constitutionality of an Ohio statute establishing procedures for the organization and governance of conservancy districts (political subdivisions of the State invested with the power to carry out flood prevention and control measures), on the sole ground that such challenges were foreclosed by *Orr* v. *Allen*, 248 U. S. 35, but none of the issues presented was raised or passed upon in *Orr*, the District Court's judgment is reversed and the case is remanded for a full consideration of such issues.

Reversed and remanded.

PER CURIAM.

Chapter 6101 of the Ohio Revised Code establishes procedures for the organization and governance of conservancy districts, political subdivisions of the State invested with the power to carry out flood prevention and control measures. The statute provides for the creation of a conservancy court each time that a petition is duly filed to propose the creation of a new district. It is the conservancy court's responsibility first to evaluate the desirability of establishing the proposed district and then, if it decides to create the district, to assume the ultimate responsibility for administering the district. A conservancy district may include territory from one or more counties, and the conservancy court is composed of one judge from the court of common pleas in each county having territory within the conservancy district.

In 1966 the Pine Creek Conservancy District was established in accordance with the procedures set forth in chapter

6101. Appellants, who collectively are residents, property owners, and taxpayers in the Pine Creek District, brought the present action, seeking declaratory and injunctive relief and alleging, *inter alia,* that chapter 6101 is unconstitutional.

Appellants leveled three constitutional challenges against the statute in the District Court, and those claims have been renewed in the instant appeal. First, they argue that it violates due process for the conservancy courts to make the decision as to whether the conservancy districts that they will administer should be formed. Since the judges of the conservancy courts are entitled to special compensation for their work on those courts, appellants contend that they have a financial incentive to declare the proposed districts organized and that, therefore, persons objecting to the formation of a district are deprived of a hearing before an impartial judicial officer. See *Ward* v. *Monroeville,* 409 U. S. 57 (1972); *Tumey* v. *Ohio,* 273 U. S. 510 (1927). Second, appellants contend that the composition of the conservancy courts violates the one-man, one-vote principle of *Baker* v. *Carr,* 369 U. S. 186 (1962), and *Reynolds* v. *Sims,* 377 U. S. 533 (1964), because the judges on those courts are selected without regard to the size of the population that they represent. Third, appellants argue that chapter 6101 permits the disenfranchisement of freeholders affected by the decision to create a conservancy district because the statute creates a presumption that a local political body, such as a township, represents the views of all persons within its jurisdiction whenever it supports a petition proposing the creation of a conservancy district.

A three-judge court rejected all of these claims on the single ground that they were foreclosed by *Orr* v. *Allen,* 248 U. S. 35 (1918), aff'g 245 F. 486 (WD Ohio 1917), a case in which we rejected a due process and equal protection attack on the statute challenged here. No. C–1–75–5 (WD Ohio, July 6, 1976).

None of the issues presented in this case was raised or passed upon in *Orr*. The appellant in *Orr* presented four issues to this Court, none of which had anything to do with the issues presented here. The appellant argued that the challenged statute denied him judicial review, that it authorized an impairment of existing contracts, that it improperly conferred legislative powers on the judiciary, and that it authorized a taking without compensation. Our three-page memorandum opinion in *Orr* did not purport to go beyond the issues raised by the appellant in that case. By no stretch of the imagination can our decision in *Orr* be thought to have silently dealt with issues which arose and were decided in later cases such as *Ward, Tumey,* and *Reynolds* v. *Sims.*

Because the court below gave no independent consideration to the issues raised by appellants and relied exclusively on *Orr,* although that case considered none of the issues now presented, it is apparent that the merits of appellants' claims have never been fully considered by any federal court. Without offering any view as to the relative merit of appellants' contentions, it is fair to say that they are not insubstantial. We therefore reverse the decision below and remand for a full consideration of the issues presented by appellants.

*So ordered.*

THE CHIEF JUSTICE would note probable jurisdiction and give plenary consideration to this appeal.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL and MR. JUSTICE STEVENS join, dissenting.

The action the Court takes today in this appeal is unexplained and very likely inexplicable. The three-judge District Court heard the case and rendered a final decision on the merits. It concluded that our affirmance in *Orr* v. *Allen,* 248 U. S. 35 (1918), and principles of *stare decisis,* compelled rejection of the constitutional challenges.

The opinion of the District Court sets forth every one of the challenges detailed by the Court today, and it is clear from its opinion that each of these claims was considered and rejected by it. On appeal here from such a decision, in the absence of relevant intervening circumstances, see, *e. g., Guste* v. *Jackson, ante,* p. 399; *Town of Lockport* v. *Citizens for Community Action,* 423 U. S. 808 (1975); *Weinberger* v. *Jobst,* 419 U. S. 811 (1974), or procedural irregularities in the District Court's consideration of the case, *e. g., Westby* v. *Doe,* 420 U. S. 968 (1975), this Court ordinarily either affirms, modifies, or reverses the judgment of the District Court. But in this case it has chosen none of these courses. Disagreeing with the District Court as to the scope of *Orr* v. *Allen,* it remands for "full consideration" of claims based on cases decided since *Orr,* in the teeth of the obvious fact that the District Court *did* consider these claims and rejected them.[1] I agree with the Court that *Orr* does not afford an adequate basis for our affirming the District Court, although I am not nearly as certain that it was not an adequate basis for the District Court's decision. But even though the Members of this Court are agreed that *Orr* is not authority for rejecting appellants' claims based on *Baker* v. *Carr,* 369 U. S. 186 (1962), and *Tumey* v. *Ohio,* 273 U. S. 510 (1927), that amounts to nothing more than a disagreement with the reasoning of the District Court on the merits of the case. We should treat those claims here now, rather than "remanding" to the District Court as if we were editing a law student's first draft of a law review note.[2]

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[1] Appellants' reply brief before the District Court amply argues that *Orr* was not controlling because that case concerned other constitutional challenges. Thus, the District Court was aware of the arguments this Court now relies on for a remand.

[2] The judgment order entered in the case states: "This matter came on for hearing by agreement of the parties upon the briefs of the parties on the issues of constitutionality of various sections of Chapter

Believing as I do that we should reach and decide these claims, I shall state briefly my reasons for concluding that they are not sufficiently substantial to warrant setting the case for argument, and that the judgment of the District Court should be affirmed.

Appellants raise three constitutional objections. Two of them are connected in the sense that they do not relate to the *operation* of the Pine Creek Conservancy District, but, rather, are objections solely to the *formation* of that district.[3] The first of these contentions is that persons objecting to the formation of a district are deprived of a hearing before an impartial judicial officer.[4] The second is that chapter

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6101 of the Ohio Revised Code dealing with Conservancy Districts." The District Court thus did canvass the contentions going to the merits, and decided the issue, albeit on a ground not favored by the majority of this Court. But there can be no contention that appellants were precluded from entering relevant evidence into the record, or precluded from presenting a pertinent legal argument. Both parties, in essence, presented all they wished to on the constitutional issues to the District Court. Nor is there any hint that the factual record is in such a shape as to preclude determination of the issues by this Court. I am simply at a loss to explain this Court's curious remand.

[3] None of the named plaintiffs allege in their complaint that they were residents at the time of the formation of the Conservancy District, although there are recitations in the body of the complaint that might indicate that at least some were residents at that time. Because of the failure to allege residency in 1966, their standing to raise such contentions is questionable.

[4] Once the district is formed, the conservancy court has no incentive to decide a particular fact situation one way or another, as their pay remains the same in either case. The Jurisdictional Statement of appellants, however, suggests another, related attack:

> "To receive payment of this *per diem,* of course, the treasury of the district must be full. The income of the district comes from assessments based on appraisals which the court must approve or disapprove . . . ."

Yet this challenge is to the remote impact on funding from full town coffers, raised and rejected in *Dugan* v. *Ohio,* 277 U. S. 61 (1928). The payments are paid out of assessments, which are the responsibility, in

6101 of the Ohio Revised Code permits disenfranchisement of freeholders to object to the formation of the district if the local political body supported the petition.

The district was formed in 1966, and these two objections were fully available to be raised at that time. This lawsuit was not filed until 1975. Absent some persuasive demonstration of a reason for such delay, I would view such a leisurely attack on the formation of a governmental body as barred by laches. "There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court." *McKnight* v. *Taylor,* 1 How. 161, 168 (1843). The appellants seek not merely a reapportionment of the voting population of the district, but a judicial declaration that its formation was a nullity. Surely an attack on the formation of an organ of government is one of the situations where "both the nature of the claim and the situation of the parties was such as to call for diligence." *Benedict* v. *City of New York,* 250 U. S. 321, 328 (1919). There has been no such diligence here, and neither the pleadings nor the proof intimates any excuse for the delay.

These two challenges, I believe, fare no better on the merits. The first, again, challenges the constitutionality, under *Tumey* v. *Ohio, supra,* of having court of common pleas judges decide whether the district should be formed, since, under § 141.07 of the Ohio Revised Code Ann. (Page 1975 Supp.), they will receive extra compensation if such district is formed. Neither *Tumey* nor *Ward* v. *Monroeville,* 409 U. S. 57 (1972), has any direct bearing on the constitutionality of the Ohio procedure for forming a conservancy district. As *Tumey* and *Ward* made clear, those cases involved quintessentially *judicial functions,* see, *e. g., Tumey, supra,* at

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the first instance, of the board of directors of the district, not the conservancy court, see Ohio Rev. Code Ann. §§ 6101.45, 6101.48 (Page 1975 Supp.). This issue surely raises no further challenge not worthy of a summary affirmance.

522.[5] Here, however, the determinations, although made by judges, are essentially legislative in nature. As Mr. Justice Holmes recognized, the determination of legislative facts does not necessarily implicate the same considerations as does the determination of adjudicative facts. *Londoner* v. *Denver,* 210 U. S. 373 (1908); *Bi-Metallic Investment Co.* v. *State Bd. of Equalization,* 239 U. S. 441 (1915). Since I know of no constitutional objection to the formation of such districts through legislative or executive action—without giving opposing citizens a chance to air their objections, see *Houck* v. *Little River Dist.,* 239 U. S. 254, 262 (1915)—I see no constitutional objection to the procedures followed here. Those procedures simply insured an *additional* check on the process of formation, already petitioned for by the town governments, and the fact that they may not have been before an "impartial" judicial officer offends no constitutional right of appellants.

The second "formation" challenge, as presented by appellants, raises the following issue:

> "Section 6101.05, Ohio Revised Code, submits the first decision in the creation of a conservancy district to the freeholders, who must petition for its creation. This is the only step in the entire procedure which calls for any participation in support or opposition, by the residents or landowners, to the creation of the district or the execution of its projects. . . . Section 6101.05, Ohio Revised Code, provides that the petition may be signed by the governing body of any public corporation in the proposed district. When such a public corporation signs

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[5] In *Gibson* v. *Berryhill,* 411 U. S. 564, 579 (1973), where the proceeding was adjudicative in nature, but not criminal, we discussed whether the "pecuniary interest of the members . . . had *sufficient substance* to disqualify them . . . ." (Emphasis supplied.) Here, of course, the proceeding is more legislative than adjudicative, and is neither criminal nor stigmatizing.

> the petition, all freeholders within it are conclusively presumed to favor creation of the district. In effect, all persons living in the three townships and one village which signed the petition who opposed the district were deprived of the right to oppose the district." Jurisdictional Statement 13–14.

This constitutional challenge is wholly insubstantial. I know of nothing, and appellants suggest nothing, which would even arguably make the issue one that freeholders were constitutionally entitled to vote on. Thus, had the statute simply allowed the governing bodies of the respective townships to form such a district, there is surely no constitutional objection simply because the populace did not vote, *Houck* v. *Little River District, supra,* at 262, 264. To the extent the claim here protests the "discrimination" against the freeholders in a town whose governing body signs the petition, in that they "were deprived of the right to oppose the district," it is simply wrong on the facts. There is no conclusive presumption, when the governing body signs a petition, that "all freeholders . . . favor creation of the district." Rather, opposing freeholders in such towns remain as free as opposing freeholders in towns where petitions are circulated, to appear before the conservancy court and "object to the organization and incorporation of said district . . . ." Ohio Rev. Code Ann. § 6101.08 (Page 1975 Supp.). They are entitled to no more under the Constitution.

Appellants raise one other objection to the constitutionality of the statutory scheme, although not limited exclusively to the formation of the district. This is the claim that the selection of judges for the conservancy court violates the one-man, one-vote principle of *Baker* v. *Carr, supra,* and its progeny. But the one-man, one-vote decisions do not apply to the selection of judges, *Wells* v. *Edwards,* 347 F. Supp. 453 (MD La. 1972), aff'd, 409 U. S. 1095 (1973). As the majority of the functions of the conservancy court are admittedly judicial, see Ohio Rev. Code Ann. §§ 6101.07, 6101.28, 6101.33 (Page 1975 Supp.), the majority of such a one-man, one-vote challenge has already been squarely rejected by *Wells*. With respect to the remaining functions, essentially legislative or executive in nature, the scope of powers granted to a conservancy district itself are so narrowly confined as not to call into play the strict application of one-man, one-vote doctrines. Conservancy districts, established solely for flood prevention and control, do not exercise "general governmental powers," as that phrase was defined in *Avery* v. *Midland County*, 390 U. S. 474 (1968). Rather, flood control is a "special limited purpose," much like that found in *Salyer Land Co.* v. *Tulare Water Dist.*, 410 U. S. 719 (1973), and, likewise, "the popular election requirements enunciated by *Reynolds* [v. *Sims*, 377 U. S. 533 (1964)] and succeeding cases are inapplicable . . . ." *Id.*, at 730. In such a situation, where both counties have an interest, and there is no evidence of discrimination against any group, see *Williams* v. *Rhodes*, 393 U. S. 23 (1968), such a selection process is permissible, *Salyer Land Co.* v. *Tulare Water Dist.*, *supra;* cf. *Hunter* v. *City of Pittsburgh*, 207 U. S. 161 (1907).[6] As I am unable to conclude that the decision to have one judge for each affected county is "wholly irrelevant to achievement of the regulation's objectives," *Kotch* v. *River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947), I would also reject this challenge and affirm the judgment of the District Court.

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[6] We are told that the Pine Creek Conservancy District lies partially in Lawrence County and partially in Scioto County. We are told that the 1970 population was 56,868 and 76,951, respectively. We are also told that "[i]n neither instance is the entire county included in the district." We are not told, however, how much of either county is in the district, nor how many freeholders reside in either county. It would seem to follow that appellants fail in their burden of showing that "the voting power of the judges" has not been approximated "to the number of people they represent, or to the land or people within the district which they represent."

period, see Ohio Rev. Code Ann. §§ 6101.07, 6101.25, 6101.23 (Page 1977 Supp.), the majority of [illegible] Although this statute [illegible] [illegible] Avery v. Midland County, 390 U. S. [illegible] [illegible] Salyer Land Co. v. Tulare Water Dist., 410 U. S. 719, [illegible] [illegible] Salyer Land Co. v. Tulare Water Dist., supra, at [illegible] [illegible] the judgment of the [illegible]

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## REPORTER'S NOTE

**The next page is purposely numbered 801. The numbers between 659 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.**

## Reporter's Note

The next page is purposely numbered 801. The numbers between [illegible] and 801 were intentionally omitted, in order to make it possible to publish the orders with permanent page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# ORDERS FROM END OF OCTOBER TERM, 1975 THROUGH FEBRUARY 22, 1977

## CASES DISMISSED IN VACATION

No. 75–6904. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed August 2, 1976, under this Court's Rule 60.

No. 75–1896. RING *v.* WADDINGTON, DIRECTOR OF MOTOR VEHICLES OF NEW JERSEY, ET AL. Super. Ct. N. J. Certiorari dismissed August 4, 1976, under this Court's Rule 60.

No. 75–1751. PEARLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed August 17, 1976, under this Court's Rule 60. Reported below: 538 F. 2d 332.

No. 76–5194. DAVIS *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari dismissed September 7, 1976, under this Court's Rule 60. Reported below: 538 F. 2d 332.

No.,76–328. GRUNER ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO. Ct. App. Cal., 5th App. Dist. Certiorari dismissed September 27, 1976, under this Court's Rule 60.

No. 75–6914. MAYES *v.* PICKETT. C. A. 9th Cir. Certiorari dismissed September 27, 1976, under this Court's Rule 60. Reported below: 537 F. 2d 1080.

## OCTOBER 4, 1976

*Affirmed on Appeal*

No. 75–1489. BALZAC BROS., INC. *v.* WARING PRODUCTS DIVISION, DYNAMICS COMPANY OF AMERICA, ET AL. Affirmed on appeal from D. C. P. R.

No. 75–1490. ZIVIAK, ADMINISTRATOR *v.* UNITED STATES. Affirmed on appeal from D. C. Mass. Reported below: 411 F. Supp. 416.

No. 75–1768. WARD *v.* BOARD OF EXAMINERS OF ENGINEERS, ARCHITECTS AND SURVEYORS OF PUERTO RICO ET AL. Affirmed on appeal from D. C. P. R. Reported below: 409 F. Supp. 1258.

No. 75-6688. Odom *v.* Caldwell. Affirmed on appeal from D. C. N. D. Ga.

No. 75-1913. Habron et al. *v.* Epstein, Commissioner of Labor and Industry of Maryland, et al. Affirmed on appeal from D. C. Md. Mr. Justice Marshall would note probable jurisdiction and set case for oral argument. Reported below: 412 F. Supp. 256.

*Appeals Dismissed*

No. 75-1386. Hadley *v.* New Hampshire. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. Reported below: 115 N. H. 541, 345 A. 2d 160.

No. 75-1408. Gipson *v.* Texas. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 529 S. W. 2d 778.

No. 75-1662. Witz, Administratrix *v.* Renner Realty Corp. et al. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 38 N. Y. 2d 905, 346 N. E. 2d 555.

No. 75-1699. Horodner *v.* Fisher, Commissioner, Department of Motor Vehicles of New York, et al. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 38 N. Y. 2d 680, 345 N. E. 2d 571.

No. 75-1734. Kubo et al. *v.* Agricultural Labor Relations Board of California et al.; and

No. 75-1754. Pandol & Sons et al. *v.* Agricultural Labor Relations Board of California et al. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 16 Cal. 3d 392, 546 P. 2d 687.

No. 75-1917. In re Robb. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. Reported below: 116 N. H. 134, 354 A. 2d 408.

No. 75-1735. Williams et al. *v.* Jones, Appraiser of Escambia County, et al. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 326 So. 2d 425.

No. 75-1818. Adams *v.* Harris County, Texas. Appeal from Ct. Civ. App. Tex., 14th Sup. Jud. Dist. dismissed for want of substantial federal question. Reported below: 530 S. W. 2d 606.

No. 75-6728. Smith et ux. *v.* Spradling, Director, Department of Revenue of Missouri. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 532 S. W. 2d 202.

No. 75-6939. Taylor *v.* Anderson. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

No. 76-32. City of Brainerd et al. *v.* Minnesota State Board of Health. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 308 Minn. 24, 241 N. W. 2d 624.

No. 76-34. Speck Restaurant, Inc. *v.* Oregon Liquor Control Commission. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 24 Ore. App. 337, 545 P. 2d 601.

No. 76-127. Acs, Administratrix *v.* Brady. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: 264 Ind. 285, 342 N. E. 2d 837.

No. 76-142. Dickson et al. *v.* New Hampshire. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. Reported below: 116 N. H. 175, 355 A. 2d 822.

No. 76-149. Stathes *v.* Maryland. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 29 Md. App. 474, 349 A. 2d 254.

No. 75–1452. Kimbell, Inc., dba Foodway Furr's, Inc., et al. *v.* Employment Security Commission of New Mexico et al. Appeal from Sup. Ct. N. M. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Mr. Justice Brennan, Mr. Justice Blackmun, and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument.

No. 75–1581. Leemon *v.* Illinois. Appeal from App. Ct. Ill., 4th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 28 Ill. App. 3d 541, 328 N. E. 2d 645.

No. 75–1750. Dayon *v.* Downe Communications, Inc., et al. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 37 N. Y. 2d 903, 340 N. E. 2d 742.

No. 75–1793. Allen et vir *v.* St. Luke's Hospital of Kansas City. Appeal from Ct. App. Mo., Kansas City Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 532 S. W. 2d 505.

No. 75–1879. Haupt *v.* Montgomery County Bar Assn. et al. Appeal from Ct. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 277 Md. 326, 353 A. 2d 629.

No. 75–6860. Bills *v.* Holiday Inns of America, Inc., et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75-6684. Tewksbury *v.* California. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 15 Cal. 3d 953, 544 P. 2d 1335.

No. 75-6694. Strickland et al. *v.* Tennessee. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 532 S. W. 2d 912.

No. 75-6901. Swigert et al. *v.* Miller et al. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-6. Generes *v.* Stich et al. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-5183. House *v.* Welsh. Appeal from Ct. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75-1670. Levy et al. *v.* City of New York et al. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Mr. Justice Brennan and Mr. Justice Marshall would note probable jurisdiction and set case for oral argument. Reported below: 38 N. Y. 2d 653, 345 N. E. 2d 556.

No. 75-1807. Stuart McGuire Co., Inc. *v.* Forst, Tax Commissioner, et al. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Mr. Justice Stewart would note probable jurisdiction and set case for oral argument.

No. 75-1873. **Uri et al.** *v.* **Alaska.** Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Reported below: 546 P. 2d 530.

No. 75-1878. **Landgraff** *v.* **Wagner et al.** Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Reported below: 26 Ariz. App. 49, 546 P. 2d 26.

No. 75-6940. **Cross** *v.* **Eu et al.** Appeal from D. C. N. D. Cal. dismissed for want of jurisdiction.

No. 76-38. **Bruce et al.** *v.* **Wichita State University et al.** Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Reported below: 219 Kan. 2, 547 P. 2d 1015.

No. 75-6744. **Figueroa** *v.* **Director, New York City Department of Personnel, et al.** Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Mr. Justice Brennan would note probable jurisdiction and set case for oral argument. Reported below: 38 N. Y. 2d 533, 344 N. E. 2d 402.

No. 75-6853. **Browne** *v.* **Massachusetts.** Appeal from Dist. Ct., E. Middlesex County, Mass., dismissed for want of jurisdiction. *Costarelli* v. *Massachusetts*, 421 U. S. 193 (1975).

No. 76-107. **Smith** *v.* **Smith.** Appeal from Sup. Ct. Okla. dismissed for want of properly presented federal question.

No. 76-194. **White, Judge** *v.* **Corrigan, Prosecuting Attorney of Cuyahoga County.** Appeal from Sup. Ct. Ohio, dismissed for want of properly presented federal question.

### *Vacated and Remanded on Appeal*

No. 75-1672. **Gustafson** *v.* **Hoffman et al.** Appeal from D. C. N. M. Judgment vacated and case remanded with directions to enter a fresh decree from which a timely appeal may be taken to the United States Court of Appeals for the Tenth Circuit.

No. 75–1881. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* RHEYNARD. Appeal from D. C. W. D. Mich. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Mathews* v. *Lucas,* 427 U. S. 495 (1976).

*Certiorari Granted—Vacated and Remanded*

No. 75–1521. DOW CHEMICAL CO. *v.* LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL.;

No. 75–1609. CHAMBER OF COMMERCE OF THE UNITED STATES *v.* LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL.;

No. 75–1858. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and cases remanded with directions to remand to the National Labor Relations Board for reconsideration in light of intervening circumstances. Reported below: 173 U. S. App. D. C. 299, 524 F. 2d 853.

No. 75–1584. GREYHOUND LINES, INC. *v.* AMALGAMATED TRANSIT UNION, DIVISION 1384, AFL–CIO, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U. S. 397 (1976). Reported below: 529 F. 2d 1073.

No. 75–6509. MIDDLETON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Doyle* v. *Ohio,* 426 U. S. 610 (1976). Reported below: 266 S. C. 251, 222 S. E. 2d 763.

No. 75–1677. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* ECHEVARRIA. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for consideration of question of mootness in light of intervening legislation. Reported below: 538 F. 2d 309.

No. 75–1756. LEBOWITZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Doyle* v. *Ohio,* 426 U. S. 610 (1976). Reported below: 313 So. 2d 473.

No. 75–6766. COLLINS *v.* ARKANSAS; and

No. 75–6797. NEAL *v.* ARKANSAS. Sup. Ct. Ark. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalty imposed, and cases remanded for further consideration in light of *Gregg* v. *Georgia,* 428 U. S. 153 (1976); *Proffitt* v. *Florida,* 428 U. S. 242 (1976); *Jurek* v. *Texas,* 428 U. S. 262 (1976); *Woodson* v. *North Carolina,* 428 U. S. 280 (1976); and *Roberts* v. *Louisiana,* 428 U. S. 325 (1976). Reported below: No. 75–6766, 259 Ark. 8, 531 S. W. 2d 13; No. 75–6797, 259 Ark. 27, 531 S. W. 2d 17.

MR. JUSTICE BRENNAN, dissenting.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976), the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. I would therefore grant certiorari in these cases and vacate the judgments insofar as they leave undisturbed the death sentences imposed.

MR. JUSTICE MARSHALL, dissenting.

Because I consider the death penalty to be a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia,* 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant certiorari in these cases and vacate the judgments insofar as they leave undisturbed the sentences of death.

No. 75–6819. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 439, 222 S. E. 2d 242;

No. 75–6842. CARTER *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 372, 222 S. E. 2d 222;

No. 75–6847. HUNT *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 403, 222, S. E. 2d 234;

No. 75–6981. BUSH *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 159, 221 S. E. 2d 333; and

No. 76–5168. DAVIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 289 N. C. 500, 223 S. E. 2d 296. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalty imposed, and cases remanded for further proceedings. *Woodson* v. *North Carolina,* 428 U. S. 280 (1976).

*Vacated and Remanded After Certiorari Granted*

No. 75–1462. DELAWARE REPUBLICAN STATE COMMITTEE ET AL. *v.* REDFEARN ET AL. C. A. 3d Cir. [Certiorari granted, 426 U. S. 919.] Judgment vacated and case remanded for further consideration in light of intervening legislation. Reported below: 524 F. 2d 1403.

*Miscellaneous Orders*

No. ———. PENNSYLVANIA PARENT ASSISTANCE AUTHORITY *v.* LEMON ET AL. C. A. 3d Cir. Motion for leave to dispense with printing petition denied. *Snider* v. *All State Administrators, Inc.,* 414 U. S. 685 (1974).

No. ———. SECOND AVENUE LIMITED DIVIDEND HOUSING ASSN. ET AL. *v.* HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 6th Cir. Motion of petitioners for leave to proceed *in forma pauperis* or in the alternative to dispense with printing petition denied.

No. ———. RAY *v.* ROSE, WARDEN. C. A. 6th Cir. Motion for appointment of counsel to file petition for writ of certiorari denied.

No. 36, Orig. TEXAS *v.* LOUISIANA, 426 U. S. 465. Petition of State of Texas for reconsideration denied.

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. Defendants' exceptions to Report of Special Master on motion of defendants for leave to file counterclaim set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 425 U. S. 931.]

No. 71, Orig. NEW YORK *v.* NEW JERSEY. Motion for leave to file bill of complaint denied. *Pennsylvania* v. *New Jersey*, 426 U. S. 660 (1976).

No. 72, Orig. SOUTH DAKOTA *v.* NEBRASKA. Motion for leave to file bill of complaint granted and State of Nebraska allowed 30 days in which to answer.

No. 74-1471. TSC INDUSTRIES, INC., ET AL. *v.* NORTHWAY, INC., 426 U. S. 438 (1976). Motion of respondent to retax costs denied. MR. JUSTICE BLACKMUN would grant the motion. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 74-6632. MOODY *v.* DAGGETT, WARDEN. C. A. 10th Cir. [Certiorari granted, 424 U. S. 942.] Motion of the Attorney General of Tennessee for leave to participate in oral argument as *amicus curiae* denied.

No. 75-442. POELKER, MAYOR OF ST. LOUIS, ET AL. *v.* DOE. C. A. 8th Cir. [Certiorari granted, 428 U. S. 909.] Motion of Americans United for Life, Inc., for leave to file brief as *amicus curiae* granted.

No. 75-492. ROSNER *v.* UNITED STATES, 427 U. S. 911. The Solicitor General is requested to file a response to petition for rehearing within 30 days.

No. 75-503. COOK ET AL. *v.* HUDSON ET AL. C. A. 5th Cir. [Certiorari granted, 424 U. S. 941.] Motion of National Education Assn. for leave to file brief as *amicus curiae* denied.

No. 75–777. National Labor Relations Board *v.* Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No. 638. C. A. D. C. Cir. [Certiorari granted, 424 U. S. 908.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 75–823. Belcher *v.* Stengel et al. C. A. 6th Cir. [Certiorari granted, 425 U. S. 910.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 75–839. Whalen, Commissioner of Health of New York *v.* Roe et al. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 424 U. S. 907.] Motion of National Association of Mental Health et al. for leave to file a brief as *amici curiae* granted.

No. 75–904. Brunswick Corp. *v.* Pueblo Bowl-O-Mat, Inc., et al. C. A. 3d Cir. [Certiorari granted, 424 U. S. 908.] Motion of Purex Corp. for leave to file a brief as *amicus curiae* granted. Motion of Procter & Gamble Co. and Clorox Co. for leave to file an opposition to motion of Purex Corp. for leave to file a brief as *amicus curiae* denied.

No. 75–1413. Stanton, Administrator, Indiana Department of Public Welfare, et al. *v.* Bond et al. C. A. 7th Cir. [Certiorari granted, 426 U. S. 905.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Mr. Justice Stevens took no part in the consideration or decision of this motion.

No. 75–1473. E. I. du Pont de Nemours & Co. et al. *v.* Train, Administrator, Environmental Protection Agency; and

No. 75–1705. Train, Administrator, Environmental Protection Agency *v.* E. I. du Pont de Nemours & Co. et al. C. A. 4th Cir. [Certiorari granted, 426 U. S. 947.] Mo-

tion of Appalachian Power Co. et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 75-1510. WEATHERFORD ET AL. *v.* BURSEY. C. A. 4th Cir. [Certiorari granted, 426 U. S. 946.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 75-1674. KINGS COUNTY ET AL. *v.* SANTA ROSA BAND OF INDIANS ET AL. C. A. 9th Cir.;

No. 75-1710. RANKIN COUNTY BOARD OF EDUCATION ET AL. *v.* ADAMS ET AL. C. A. 5th Cir.; and

No. 75-6990. BALL *v.* DUNLAP, CHAIRMAN, RHODE ISLAND STATE PILOTAGE COMMISSION, ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in each of these cases expressing the views of the United States.

No. 75-6927. GOMORI *v.* ARNOLD, WARDEN, ET AL.;

No. 76-5099. BROOKS *v.* SCISM, CHAIRMAN, NORTH CAROLINA PAROLE COMMISSION, ET AL.;

No. 76-5190. LINDSLEY *v.* ATTORNEY GENERAL OF PENNSYLVANIA ET AL.; and

No. 76-5222. HOLMES *v.* ISRAEL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75-1836. THOMPSON ET UX. *v.* SUPREME COURT OF ILLINOIS ET AL.;

No. 75-6499. LOVE *v.* GRAY, WARDEN;

No. 75-6581. MONTGOMERY *v.* NOEL, U. S. DISTRICT JUDGE;

No. 75-6917. WILLIAMS *v.* PHILLIPS ET AL.;

No. 75-6998. MORTON ET AL. *v.* UNITED STATES ET AL.;

No. 76-5155. GREEN *v.* HUNTER, U. S. DISTRICT JUDGE; and

No. 76-5195. GREEN *v.* WANGELIN, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 75-6891. Foster *v.* Hardy et al. Motion for leave to file petition for writ of prohibition denied.

No. 75-1757. Clancey *v.* United States House of Representatives et al. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

*Probable Jurisdiction Noted or Postponed*

No. 75-1513. Howlett, Secretary of State of Illinois *v.* Love. Appeal from D. C. N. D. Ill. Probable jurisdiction noted.

No. 75-1812. Shaffer et al. *v.* Heitner. Appeal from Sup. Ct. Del. Probable jurisdiction noted. Reported below: 361 A. 2d 225.

No. 75-1861. Patterson *v.* New York. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 39 N. Y. 2d 288, 347 N. E. 2d 898.

No. 76-29. Complete Auto Transit, Inc. *v.* Brady, Chairman, Mississippi Tax Commission. Appeal from Sup. Ct. Miss. Probable jurisdiction noted. Reported below: 330 So. 2d 268.

No. 76-128. Mandel, Governor of Maryland, et al. *v.* Bradley et al. Appeal from D. C. Md. Probable jurisdiction noted.

No. 76-316. Bates et al. *v.* State Bar of Arizona. Appeal from Sup. Ct. Ariz. Probable jurisdiction noted. Reported below: 113 Ariz. 394, 555 P. 2d 640.

No. 75-1691. Guest, President of Methodist Hospital, et al. *v.* Fitzpatrick, District Attorney of Philadelphia, et al.; and

No. 75-1698. Williamsport Hospital et al. *v.* Fitzpatrick, District Attorney of Philadelphia. Appeals from D. C. E. D. Pa. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 409 F. Supp. 818.

No. 75-1704. HOFFMANN, SECRETARY OF THE ARMY *v.* FIOTO. Appeal from D. C. E. D. N. Y. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 409 F. Supp. 831.

No. 75-1707. OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. *v.* HODORY. Appeal from D. C. N. D. Ohio. Motions of Chamber of Commerce of the United States, Republic Steel Corp., and United States Steel Corp. for leave to file briefs as *amici curiae* granted. Motions of Republic Steel Corp. and United States Steel Corp. for leave to intervene denied. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 408 F. Supp. 1016.

No. 76-63. HOLSHOUSER, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* WASHINGTON STATE APPLE ADVERTISING COMMISSION. Appeal from D. C. E. D. N. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 408 F. Supp. 857.

*Certiorari Granted*

No. 75-1721. UNITED STATES *v.* CHADWICK ET AL. C. A. 1ST CIR. Certiorari granted. Reported below: 532 F. 2d 773.

No. 75-1753. SANTA FE INDUSTRIES, INC., ET AL. *v.* GREEN ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 533 F. 2d 1283 and 1309.

No. 75-1771. COMMISSIONER OF INTERNAL REVENUE *v.* STANDARD LIFE & ACCIDENT INSURANCE CO. C. A. 10th Cir. Certiorari granted. Reported below: 525 F. 2d 786.

No. 75-1693. BLACKLEDGE, WARDEN, ET AL. *v.* ALLISON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 533 F. 2d 894.

No. 75-1775. **Massachusetts** *v.* **Westcott.** Sup. Jud. Ct. Mass. Certiorari granted. Reported below: — Mass. —, 344 N. E. 2d 411.

No. 75-1805. **Jeffers** *v.* **United States.** C. A. 7th Cir. Certiorari granted. Reported below: 532 F. 2d 1101.

No. 76-156. **Vendo Co.** *v.* **Lektro-Vend Corp. et al.** C. A. 7th Cir. Certiorari granted. Reported below: 545 F. 2d 1050.

No. 75-1344. **Scarborough** *v.* **United States.** C. A. 4th Cir. Certiorari granted limited to Question No. 1 presented by the petition. Reported below: 539 F. 2d 331.

No. 75-1906. **Henderson, Correctional Superintendent** *v.* **Kibbe.** C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 534 F. 2d 493.

No. 75-1870. **E. I. du Pont de Nemours & Co. et al.** *v.* **Collins et al.**; and

No. 75-1872. **Securities and Exchange Commission** *v.* **Collins et al.** C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 532 F. 2d 584.

No. 75-5444. **Coker** *v.* **Georgia.** Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* and certiorari granted limited to Question No. 1 presented by the petition. Reported below: 234 Ga. 555, 216 S. E. 2d 782.

No. 75-6568. **Hankerson** *v.* **North Carolina.** Sup. Ct. N. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 288 N. C. 632, 220 S. E. 2d 575.

No. 76-167. **United States** *v.* **Ramsey et al.** C. A. D. C. Cir. Motion of respondent James W. Kelly for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 176 U. S. App. D. C. 67, 538 F. 2d 415.

*Certiorari Denied.* (See also Nos. 75–1581, 75–1750, 75–1793, 75–1879, 75–6684, 75–6694, 75–6860, 75–6901, 76–6, and 76–5183, *supra.*)

No. 75–1073. Pennsylvania *v.* MacDonald. Sup. Ct. Pa. Certiorari denied. Reported below: 464 Pa. 435, 347 A. 2d 290.

No. 75–1258. Blackie et al. *v.* Barrack et al.;

No. 75–1300. Touche Ross & Co. *v.* Barrack et al.; and

No. 75–1314. Roberts et al. *v.* Barrack et al. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 891.

No. 75–1303. Qantas Airways Ltd. *v.* Foremost International Tours, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 525 F. 2d 281.

No. 75–1357. California *v.* Superior Court of California, County of Mono (Zolnay et al., Real Parties in Interest). Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 3d 729, 542 P. 2d 1390.

No. 75–1373. Irving *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75–1392. Welch *v.* Welch, aka Confer. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–1415. McGuire *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 75–1423. Kentucky Utilities Co. *v.* Federal Power Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 100, 529 F. 2d 342.

No. 75–1424. Ciovacco *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 961.

No. 75–1444. Joyce *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 529.

No. 75-1432. Abell et al. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 207, 518 F. 2d 1369.

No. 75-1451. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 771.

No. 75-1454. Sanchez et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 244.

No. 75-1455. DuFresne, aka Sudler, et al. *v.* Sudler. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 28 Ill. App. 3d 1037, 328 N. E. 2d 909.

No. 75-1456. Lemmons *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 662.

No. 75-1463. Cabbler *v.* Superintendent, Virginia State Penitentiary. C. A. 4th Cir. Certiorari denied. Reported below: 528 F. 2d 1142.

No. 75-1465. Atlantic Tubing & Rubber Co. *v.* International Engraving Co. C. A. 1st Cir. Certiorari denied. Reported below: 528 F. 2d 1272.

No. 75-1472. Chase *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 1405.

No. 75-1475. United States Steel Corp. *v.* United Steelworkers of America, AFL-CIO, et al.; and

No. 75-1478. United Steelworkers of America, AFL-CIO, et al. *v.* Ford et al. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 1043.

No. 75-1479. Local Union No. 795, International Longshoremen's Assn., AFL-CIO, et al. *v.* McDonald et al. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1217.

No. 75–1484. Lubrano *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 529 F. 2d 633.

No. 75–1486. Whitaker, aka Wittaker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1031.

No. 75–1487. Evans et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 701.

No. 75–1494. Schenker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 96.

No. 75–1497. Acupuncture Center of Washington et al. *v.* Usery, Secretary of Labor, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 367, 543 F. 2d 852.

No. 75–1499. Busse *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75–1501. Ivey et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

No. 75–1505. A. W. Thompson, Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 870.

No. 75–1506. Hondo Drilling Co. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 864.

No. 75–1508. Fedders Corp. *v.* Federal Trade Commission. C. A. 2d Cir. Certiorari denied. Reported below: 529 F. 2d 1398.

No. 75–1514. Peskin *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 527 F. 2d 71.

No. 75–1520. Wangrud *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 495.

No. 75-1517. Kwiek *v.* Board of Fire & Police Commissioners of Village of Schaumburg et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 30 Ill. App. 3d 1099, 339 N. E. 2d 46.

No. 75-1522. Kantrowitz *v.* Mathews, Secretary of Health, Education, and Welfare. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 182, 530 F. 2d 1034.

No. 75-1526. Biedenharn Realty Co., Inc. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 409.

No. 75-1528. Baptista *v.* United States; and

No. 75-1529. Hathaway *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 534 F. 2d 386.

No. 75-1530. Horan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75-1537. Blitz *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 1329.

No. 75-1538. Mastrangelo et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 316.

No. 75-1540. Natick Paperboard Corp. et al. *v.* Mathews, Secretary of Health, Education, and Welfare, et al. C. A. 1st Cir. Certiorari denied. Reported below: 525 F. 2d 1103.

No. 75-1541. Hoff et al. *v.* United States; and

No. 75-1554. Stofsky et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 237.

No. 75-1543. Missouri Pacific Railroad Co. et al. *v.* White et al. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 1406.

No. 75-1544. HARPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 530 F. 2d 828.

No. 75-1548. WIENER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 15.

No. 75-1555. CONLEY *v.* HAMPTON, CHAIRMAN, CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 241, 530 F. 2d 1093.

No. 75-1557. YOKUM *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 972, 529 F. 2d 532.

No. 75-1559. PARNESS ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 474.

No. 75-1567. HORTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 884.

No. 75-1568. J. FRANK KELLY, INC., ET AL. *v.* SWINTON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 180 U. S. App. D. C. 216, 554 F. 2d 1075.

No. 75-1571. ENTRINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 634.

No. 75-1574. DEFRANCIS *v.* BOSSIER CITY. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 322 So. 2d 333.

No. 75-1575. KIRSCHKE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 53 Cal. App. 3d 405, 125 Cal. Rptr. 680.

No. 75-1576. RADETSKY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 535 F. 2d 556.

No. 75-1586. ROGERS BROTHERS WHOLESALERS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 354.

No. 75–1577. **Broderick** *v.* **Catholic University of America**; and

No. 75–1647. **Granfield** *v.* **Catholic University of America**. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 183, 530 F. 2d 1035.

No. 75–1585. **McGuire** *v.* **United States**. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75–1587. **Snow** *v.* **United States**. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 224.

No. 75–1588. **Wathen** *v.* **United States**. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 342, 527 F. 2d 1191.

No. 75–1590. **Miranda** *v.* **United States**. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 1319.

No. 75–1591. **Young** *v.* **Texas**. Ct. Crim. App. Tex. Certiorari denied. Reported below: 531 S. W. 2d 647.

No. 75–1593. **Perkal** *v.* **United States**. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 604.

No. 75–1594. **Kennebec Log Driving Co. et al.** *v.* **United States**. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 446.

No. 75–1596. **Grundy et al.** *v.* **Manchester Insurance & Indemnity Co.** Sup. Ct. Ky. Certiorari denied. Reported below: 531 S. W. 2d 493.

No. 75–1598. **Global Marine Development of California, Inc.** *v.* **National Labor Relations Board et al.** C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 92.

No. 75–1599. **Zager et al.** *v.* **Usery, Secretary of Labor**. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 524.

No. 75–1604. Silver Bell Industries, Inc. *v.* United States et al. C. A. 10th Cir. Certiorari denied.

No. 75–1615. Utah Capital Corp. et al. *v.* United States District Court for the Northern District of California (Securities and Exchange Commission et al., Real Parties in Interest). C. A. 9th Cir. Certiorari denied.

No. 75–1618. Mannella *v.* United States; and
No. 75–1738. Rosa *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75–1619. Gibson et al. *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 532 S. W. 2d 69.

No. 75–1624. Stearns *v.* Veterans of Foreign Wars. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 78, 527 F. 2d 1387.

No. 75–1625. Arlen Realty & Development Corp. et al. *v.* Condor Corp. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 87.

No. 75–1626. Associated General Contractors of America, Inc., Oregon-Columbia Chapter, et al. *v.* International Union of Operating Engineers, Local 701. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 1395.

No. 75–1627. Jackson County, Missouri, et al. *v.* Public Service Commission of Missouri et al. Sup. Ct. Mo. Certiorari denied. Reported below: 532 S. W. 2d 20.

No. 75–1629. Fernandez *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–1630. Anderson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 249.

No. 75–1632. Bianco *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 501.

No. 75-1631. Kirkland et al. *v.* New York State Department of Correctional Services et al. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 420.

No. 75-1633. Turk *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 654.

No. 75-1634. Blake *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75-1636. Ungar et al. *v.* Dunkin' Donuts of America, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 531 F. 2d 1211.

No. 75-1637. Wade *v.* Henkenberns et al. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 75-1639. Stepping Stone Enterprises et al. *v.* Andrews et al. C. A. 1st Cir. Certiorari denied. Reported below: 531 F. 2d 1.

No. 75-1640. National Dynamics Corp. et al. *v.* Federal Trade Commission. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 312.

No. 75-1641. Woodlan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 608.

No. 75-1645. Davis *v.* Marathon Oil Co. C. A. 6th Cir. Certiorari denied. Reported below: 528 F. 2d 395.

No. 75-1646. Sociedad Civil Agricola e Industrial Heirs of J. Serralles *v.* Puerto Rico. Sup. Ct. P. R. Certiorari denied. Reported below: — P. R. R. —.

No. 75-1650. Mr. Steak, Inc., et al. *v.* Hellerstein. C. A. 10th Cir. Certiorari denied. Reported below: 531 F. 2d 470.

No. 75-1651. Matheson, Executor *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 809.

No. 75–1652. Stone *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 531 F. 2d 939.

No. 75–1656. Bean *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 239 N. W. 2d 556.

No. 75–1658. Westwood Chemical, Inc. *v.* PPG Industries, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 700.

No. 75–1659. Rowlett et al. *v.* United States; and
No. 75–6770. Pauldino *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75–1661. Valley Mold Co., Inc. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 693.

No. 75–1665. Chestnutt Corp. et al. *v.* Fogel et al. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 731.

No. 75–1669. Illman *v.* Ohio State Bar Assn. Sup. Ct. Ohio. Certiorari denied. Reported below: 45 Ohio St. 2d 159, 342 N. E. 2d 688.

No. 75–1671. Richardson *v.* Communications Workers of America, AFL–CIO, et al. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 126.

No. 75–1675. Antilles Industries, Inc. *v.* Government of the Virgin Islands et al. C. A. 3d Cir. Certiorari denied. Reported below: 529 F. 2d 605.

No. 75–1676. Boscia *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75–1679. Nenoff, Ancillary Administratrix *v.* Thompson. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 75–1680. Fatheree *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 534 F. 2d 330.

No. 75–1681. Miller *v.* Stag Oil Producers, Inc. Sup. Ct. Wyo. Certiorari denied.

No. 75–1682. Wilson Freight Forwarding Co., aka Wilson Freight Co. *v.* Baughman et al. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 529.

No. 75–1683. Yellow Freight System, Inc. *v.* Occupational Safety and Health Review Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 243, 530 F. 2d 1095.

No. 75–1684. City of New York *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 308.

No. 75–1686. Lodge 743, International Association of Machinists & Aerospace Workers, AFL–CIO, et al. *v.* National Labor Relations Board; and

No. 75–1729. Lodge 743, International Association of Machinists & Aerospace Workers, AFL–CIO, et al. *v.* United Aircraft Corp. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 422.

No. 75–1688. Jonal Corp. *v.* District of Columbia. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 57, 533 F. 2d 1192.

No. 75–1689. Mayfair Construction Corp. *v.* Bodrick et al. Ct. App. N. Y. Certiorari denied. Reported below: 38 N. Y. 2d 926, 346 N. E. 2d 820.

No. 75–1694. Jones et al. *v.* New York City Human Resources Administration et al. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 2d 696.

No. 75–1696. Kazonis *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 962.

No. 75–1697. Gunning et al. *v.* Gray et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–1700. Smart *v.* Texas Power & Light Co. et al.; and

No. 75–1701. Smart *v.* Texas Power & Light Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: No. 75–1700, 525 F. 2d 1211; No. 75–1701, 525 F. 2d 1209.

No. 75–1702. Barry et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 528 F. 2d 1094.

No. 75–1703. Wright Motors, Inc. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 529.

No. 75–1708. Lugo *v.* Employees Retirement Fund of the Illumination Products Industry et al. C. A. 2d Cir. Certiorari denied. Reported below: 529 F. 2d 251.

No. 75–1709. Parker *v.* Boorstin, Librarian of Congress, et al. C. A. D. C. Cir. Certiorari denied.

No. 75–1711. Daniels et al., dba Heart of the Black Hills Stations *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied.

No. 75–1713. Pilgrim Equipment Co., Inc., et al. *v.* Usery, Secretary of Labor. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 1308.

No. 75–1714. Carlsberg Mobile Home Properties, Ltd. — '72 *v.* Sibley et al. Sup. Ct. Cal. Certiorari denied. Reported below: 16 Cal. 3d 442, 546 P. 2d 322.

No. 75–1717. Banking Board of Oklahoma et al. *v.* Neel et al. Ct. Bank Review Okla. Certiorari denied.

No. 75-1715. Labit *v.* Santa Fe Marine, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 961.

No. 75-1718. Union Pacific Railroad Co. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 1, 524 F. 2d 1343.

No. 75-1720. Naftalin *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 770.

No. 75-1722. Folliard *v.* Semler, Administratrix, et al. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 121.

No. 75-1725. Montgomery County Community Action Agency *v.* Powers. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 75-1727. Nance *v.* Oregon State System of Higher Education et al. Ct. App. Ore. Certiorari denied. Reported below: 23 Ore. App. 558, 543 P. 2d 687.

No. 75-1730. Two Tracts of Land Containing a Total of 146.4 Acres et al. *v.* Tennessee Valley Authority. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 1083.

No. 75-1732. First National City Bank *v.* American Fidelity Fire Insurance Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 534 F. 2d 532.

No. 75-1733. Simon *v.* Simon. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 317 So. 2d 83.

No. 75-1736. Apex Oil Co. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 1291.

No. 75-1739. Dade County Classroom Teachers' Assn., Inc. *v.* National Education Assn. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 1388.

No. 75-1742. ZENITH LABORATORIES, INC. *v.* CARTER-WALLACE, INC. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 508.

No. 75-1746. ALSBURY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 530 F. 2d 852.

No. 75-1747. W. T. MAYFIELD SONS TRUCKING CO. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-1748. DONAHEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 831.

No. 75-1752. HILLIARD *v.* ARMCO STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 746.

No. 75-1758. YPSILANTI PRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1256.

No. 75-1760. HILTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 534 F. 2d 556.

No. 75-1762. KLEMOW *v.* TIME, INC. Sup. Ct. Pa. Certiorari denied. Reported below: 466 Pa. 189, 352 A. 2d 12.

No. 75-1765. RIEBSCHLAEGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 1031.

No. 75-1767. Y. HATA & CO., LTD., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 508.

No. 75-1769. GREAT UNITED REALTY CO., INC. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 750.

No. 75-1770. HURLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 63 Ill. 2d 1, 345 N. E. 2d 97.

No. 75-1773. Desert Outdoor Advertising, Inc. *v.* Department of Transportation of California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75-1774. Civic Awareness of America, Ltd., et al. *v.* Mathews, Secretary of Health, Education, and Welfare, et al. C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 756.

No. 75-1776. Long *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 505.

No. 75-1777. Craig *v.* Sun Oil Company of Pennsylvania et al. C. A. 10th Cir. Certiorari denied. Reported below: 515 F. 2d 221.

No. 75-1778. Standard Oil Company of California et al. *v.* Florida ex rel. Shevin, Attorney General of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 266.

No. 75-1779. Chestnut *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 40.

No. 75-1780. Metallurgical Exoproducts Corp. *v.* Pittsburgh Metals Purifying Co., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 747.

No. 75-1781. Hemingway et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 636.

No. 75-1783. Oakley *v.* Kneff. Sup. Ct. Ky. Certiorari denied.

No. 75-1784. Hardwick et al. *v.* Jacobs. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 520.

No. 75-1785. Gross *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75-1787. SMOKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1256.

No. 75-1788. CAREY TRANSPORTATION, INC. *v.* TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY. Ct. App. N. Y. Certiorari denied. Reported below: 38 N. Y. 2d 545, 345 N. E. 2d 281.

No. 75-1789. ASHMORE ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 236 Ga. 401, 224 S. E. 2d 334.

No. 75-1790. BRACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 314.

No. 75-1791. ARTHUR ANDERSEN & CO. *v.* KRAMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 534 F. 2d 1085.

No. 75-1792. UNITED EQUITY CORP. ET AL. *v.* YOUNG PROPERTIES CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 847.

No. 75-1794. EVER-READY, INC., ET AL. *v.* UNION CARBIDE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 531 F. 2d 366.

No. 75-1795. STRAUBE *v.* LARSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 339.

No. 75-1800. CALLAHAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 534 F. 2d 763.

No. 75-1802. REEVES *v.* UNITED STATES; and

No. 75-6834. BERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1256.

No. 75-1803. HACKENBERGER, DBA RON'S TRUCKING SERVICE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 531 F. 2d 364.

No. 75-1804. DEFEIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 14.

No. 75-1806. Ratley *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75-1814. Rella Verde Apartments, Inc., et al. *v.* Arizona et al. Ct. App. Ariz. Certiorari denied. Reported below: 25 Ariz. App. 458, 544 P. 2d 675.

No. 75-1819. Cuthbertson et al. *v.* Charlotte-Mecklenburg Board of Education. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1249.

No. 75-1820. Stricklin et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 534 F. 2d 1386.

No. 75-1821. Abbott Laboratories, Ross Laboratories Division *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 2d 276.

No. 75-1822. New Orleans Public Service, Inc. *v.* Power Division Assn. et al. C. A. 5th Cir. Certiorari denied.

No. 75-1823. McFarland *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 137 Ga. App 354, 223 S. E. 2d 739.

No. 75-1824. Malajalian *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 957, 538 F. 2d 346.

No. 75-1825. Littrell *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 75-1827. Greenberg *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 523.

No. 75-1828. Pollutro *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 1018, 529 F. 2d 533.

No. 75-1829. International Brotherhood of Electrical Workers, Local No. 12, AFL-CIO, et al. *v.* A-1 Electric Service, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 535 F. 2d 1.

No. 75-1830. Janssen *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 239 N.W. 2d 564.

No. 75-1834. Iowa Movers & Warehousemen's Assn. *v.* Briggs, Director, Iowa Department of Revenue, et al. Sup. Ct. Iowa. Certiorari denied. Reported below: 237 N. W. 2d 759.

No. 75-1835. Lamour-Nadal *v.* Puerto Rico Tourist Development Co. C. A. 1st Cir. Certiorari denied.

No. 75-1837. Packard *v.* Welch et al. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 333.

No. 75-1839. Sperl *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 54 Cal. App. 3d 640, 126 Cal. Rptr. 907.

No. 75-1840. Haviland *v.* Butz, Secretary of Agriculture. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 22, 543 F. 2d 169.

No. 75-1841. Great Lakes Dredge & Dock Co. *v.* Department of Taxation and Finance of New York. Ct. App. N. Y. Certiorari denied. Reported below: 39 N. Y. 2d 75, 346 N. E. 2d 796.

No. 75-1845. Stryker et al. *v.* Village of Oak Park, Ill., et al. Sup. Ct. Ill. Certiorari denied. Reported below: 62 Ill. 2d 523, 343 N. E. 2d 919.

No. 75-1846. CMI Corp. *v.* Lakeland Construction Co., Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 757.

No. 75–1848. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 52.

No. 75–1849. SPAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 536 F. 2d 170.

No. 75–1850. DONAHUE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 344 N. E. 2d 886.

No. 75–1851. DELLY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 30 Md. App. 391, 352 A. 2d 331.

No. 75–1854. FULTON MARKET COLD STORAGE CO. *v.* KORZEN, TREASURER OF COOK COUNTY. Sup. Ct. Ill. Certiorari denied. Reported below: 62 Ill. 2d 443, 343 N. E. 2d 450.

No. 75–1855. CATES *v.* BEAUREGARD ELECTRIC COOPERATIVE, INC., ET AL. Sup. Ct. La. Certiorari denied. Reported below: 328 So. 2d 367.

No. 75–1856. PONCIANO ET AL. *v.* UNITED FARM WORKERS ORGANIZING COMMITTEE ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 75–1857. GABRIEL ET AL. *v.* LEVIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–1859. TAYLOR *v.* LIBERAL MARKET, INC. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75–1860. JHIRAD *v.* FERRANDINA, U. S. MARSHAL. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 478.

No. 75–1863. LEWIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 328 So. 2d 75.

No. 75–1866. STONAKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 236 Ga. 1, 222 S. E. 2d 354.

No. 75-1876. STOWERS ET AL. *v.* MAHON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 1238.

No. 75-1877. SKEEN ET UX. *v.* VALLEY BANK OF NEVADA. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 75-1880. TITLE GUARANTEE CO., A SUBSIDIARY OF PIONEER NATIONAL TITLE INSURANCE CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 484.

No. 75-1885. MCDONALD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 57 Ala. App. 529, 329 So. 2d 583.

No. 75-1888. BRUBRAD CO. *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 308.

No. 75-1889. PENNSYLVANIA ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 263, 535 F. 2d 91.

No. 75-1890. DIMITRI'S GOLDEN STAR, INC., ET AL. *v.* ARTHUR TREACHER'S FISH & CHIPS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1254.

No. 75-1891. WEINSTOCK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-1895. DOW CHEMICAL CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 266.

No. 75-1898. MARINE ENGINEERS BENEFICIAL ASSN., ASSOCIATED MARITIME OFFICERS, AFL-CIO *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 1074.

No. 75–1897. Rogers *v.* Board of Trustees of McKendree College et al. C. A. 7th Cir. Certiorari denied. Reported below: 534 F. 2d 330.

No. 75–1901. Sloan *v.* Canadian Javelin, Ltd., et al. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 313.

No. 75–1902. Luther *v.* International Association of Bridge, Structural & Ornamental Iron Workers, Local 16, et al. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1250.

No. 75–1903. International Railways of Central America *v.* United Brands Co. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 231.

No. 75–1904. United Brotherhood of Carpenters & Joiners of America, AFL–CIO, et al. *v.* Noranda Aluminum, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 528 F. 2d 1304.

No. 75–1907. Chavez *v.* Texas. Sup. Ct. Tex. Certiorari denied. Reported below: 533 S. W. 2d 746.

No. 75–1908. Rosen et al. *v.* Public Service Electric & Gas Co. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 645.

No. 75–1912. District Unemployment Compensation Board *v.* Benjamin Rose Institute. Ct. App. D. C. Certiorari denied. Reported below: 355 A. 2d 569.

No. 75–1915. David *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 75–1921. Dreyfus *v.* Von Finck et al. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 24.

No. 75–6389. McClain *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 2d 431.

No. 75-6425. Woodson, aka Rhyshe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1404.

No. 75-6465. Saffold *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-6496. Acosta de Evans *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 2d 428.

No. 75-6497. Hero *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1244.

No. 75-6498. Helker *v.* New Mexico. Ct. App. N. M. Certiorari denied. Reported below: 88 N. M. 650, 545 P. 2d 1028.

No. 75-6506. Dunham *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 16 Cal. 3d 63, 545 P. 2d 255.

No. 75-6522. Omernick et ux. *v.* Department of Natural Resources et al. Sup. Ct. Wis. Certiorari denied. Reported below: 71 Wis. 2d 370, 238 N. W. 2d 114.

No. 75-6523. Holmen, aka Ramsey *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6524. Collins *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 79.

No. 75-6526. Fiaalii *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75-6538. Parker *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 75-6541. Uziel *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1244.

No. 75-6544. Scott *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 326 So. 2d 165.

No. 75-6548. **Morrison** *v.* **United States.** C. A. 1st Cir. Certiorari denied. Reported below: 531 F. 2d 1089.

No. 75-6553. **Hackett** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 143.

No. 75-6557. **Anderson** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 590.

No. 75-6560. **Nicholson** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1233.

No. 75-6561. **Robinson et al.** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 754.

No. 75-6566. **Lewis** *v.* **United States.** C. A. 8th Cir. Certiorari denied.

No. 75-6571. **Knight** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75-6573. **Smith** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75-6585. **Weiner et al.** *v.* **United States.** C. A. 9th Cir. Certiorari denied.

No. 75-6586. **Hanes** *v.* **Sullivan, Prison Commissioner.** C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 520.

No. 75-6587. **Morgan** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 75-6592. **Ross** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 531 F. 2d 839.

No. 75-6594. **Graham** *v.* **United States.** C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 962.

No. 75-6599. **Rea** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 147.

No. 75–6600. Vigil *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied.

No. 75–6601. Robinson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

No. 75–6604. Pruitt *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 716.

No. 75–6606. Willis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 308.

No. 75–6607. Carter *v.* Hardy. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 314.

No. 75–6610. Porter et al. *v.* United States et al. C. A. 8th Cir. Certiorari denied.

No. 75–6612. Reiser *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 673.

No. 75–6614. Pandelli *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 1108.

No. 75–6617. Golightly *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75–6618. Lee *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 911.

No. 75–6619. Allen *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 710, and 527 F. 2d 1373.

No. 75–6625. Pounds, aka Hornsby, et al. *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 50 App. Div. 2d 782, 377 N. Y. S. 2d 78.

No. 75–6628. Byus *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1350.

No. 75–6632. Palmer *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1350.

No. 75-6633. Gates *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 1045.

No. 75-6643. Williams *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 810.

No. 75-6644. Trammell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 927.

No. 75-6646. Palilla *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 256.

No. 75-6649. Marchesani *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75-6651 Pezzino *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 483.

No. 75-6652. Miller et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 532 F. 2d 1335.

No. 75-6656. Lieggi *v.* Immigration and Naturalization Service. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 530.

No. 75-6660. Anderson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1218.

No. 75-6662. Walker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 75-6663. Nussen *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 15.

No. 75-6665. Bocook *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 977.

No. 75-6668. Dockery *v.* United States et al. C. A. 9th Cir. Certiorari denied.

No. 75-6670. Varnado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 75-6676. **James** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 1161.

No. 75-6677. **Bostic** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75-6680. **Fitzgerald, Public Administrator of New York County** *v.* **Zim Israel Navigation Co. et al.** C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 309.

No. 75-6681. **Zatko** *v.* **United States.** C. A. 9th Cir. Certiorari denied.

No. 75-6683. **Barnes** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 569.

No. 75-6687. **Hale** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-6691. **Budd** *v.* **United States.** Ct. App. D. C. Certiorari denied. Reported below: 350 A. 2d 742.

No. 75-6693. **Weeks** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75-6699. **Jones** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 1344.

No. 75-6700. **Bowser** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1318.

No. 75-6701. **Prout** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 380 and 529 F. 2d 999.

No. 75-6702. **Montgomery** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 75-6706. **Alewelt** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 1165.

No. 75-6708. **Burkhart** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 340.

No. 75-6709. Seledon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 343.

No. 75-6710. Wishon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 334.

No. 75-6712. Bell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 974.

No. 75-6713. Cacace *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1167.

No. 75-6714. Haight *v.* United States. Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 698, 538 F. 2d 346.

No. 75-6715. Harman *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 351 A. 2d 504.

No. 75-6716. Kearney *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 534 F. 2d 31.

No. 75-6717. Kato *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75-6720. Gidley et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 1345.

No. 75-6722. Buckley *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 75-6723. Shadd *v.* Thornburg et al. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75-6724. Gray *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 531 F. 2d 933.

No. 75-6726. Slaton *v.* United States. Ct. App. D. C. Certiorari denied.

No. 75-6727. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-6729. Meece, aka Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 75-6730. White *v.* Idaho. Sup. Ct. Idaho. Certiorari denied. Reported below: 97 Idaho 708, 551 P. 2d 1344.

No. 75-6731. Pillis *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6732. Baker *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75-6733. Esparza-Nevarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 518 F. 2d 1405.

No. 75-6734. Briggs *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied.

No. 75-6735. Trowery et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1244.

No. 75-6736. Carter *v.* Masco Mechanical Contractors, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 520.

No. 75-6738. Osborne *v.* United States et al. C. A. 6th Cir. Certiorari denied.

No. 75-6739. Tesar *v.* Illinois Attorneys Registration Commission. C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 756.

No. 75-6740. Dinkins *v.* Alabama. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 1268.

No. 75-6743. McCraney *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1255.

No. 75-6745. Stevenson *v.* Brewer, Warden. Sup. Ct. Iowa. Certiorari denied. Reported below: 240 N. W. 2d 449.

No. 75–6746. Morgan *v.* Rees, Warden. C. A. 9th Cir. Certiorari denied.

No. 75–6748. Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 976.

No. 75–6749. Noto *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75–6750. Kaye *v.* U. S. Civil Service Commission. C. A. 9th Cir. Certiorari denied.

No. 75–6751. Warren *v.* Aaron, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 696.

No. 75–6752. Moody *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 516.

No. 75–6753. Cartano *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 788.

No. 75–6754. Bonds *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 331.

No. 75–6756. Zatko *v.* Brown, Governor of California, et al. C. A. 9th Cir. Certiorari denied.

No. 75–6757. Johnson *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75–6758. Franzella *v.* Secretary of Health, Education, and Welfare. C. A. 2d Cir. Certiorari denied.

No. 75–6759. Schlobohm *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 343.

No. 75–6760. Carter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 752.

No. 75–6762. Schwartz *v.* Court of Common Pleas of Philadelphia et al. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75-6761. BURNETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75-6763. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1087.

No. 75-6764. MCALLISTER *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 813.

No. 75-6765. KUCHTA *v.* ALLSTATE INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1051.

No. 75-6767. MATHEWS *v.* MATHEWS. Ct. App. Ga. Certiorari denied. Reported below: 136 Ga. App. 833, 222 S. E. 2d 609.

No. 75-6768. HARMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 75-6769. GLAZER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 224.

No. 75-6771. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 752.

No. 75-6772. BRADSHAW *v.* SEA WORLD, INC., AKA MARINE PARK CORP., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 334.

No. 75-6773. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 75-6774. CHRYSLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 533 F. 2d 1055.

No. 75-6775. ALEJANDRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 423.

No. 75-6776. KOWALSKI *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 533 F. 2d 1071.

No. 75-6777. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75-6778. Lacey *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 821.

No. 75-6779. Robinson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 527 F. 2d 63.

No. 75-6780. Patuto *v.* Commissioners of Civil Service of Mass. et al. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 369 Mass. 166, 338 N. E. 2d 829.

No. 75-6781. Bailey *v.* Holley, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 169.

No. 75-6783. Samson *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 533 F. 2d 721.

No. 75-6784. Rosa *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 170 Conn. 417, 365 A. 2d 1135.

No. 75-6785. McAbee *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 752.

No. 75-6786. Oden *v.* Mathews, Secretary of Health, Education, and Welfare. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1405.

No. 75-6789. Smith *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 751.

No. 75-6790. Munoz *v.* Civil Service Commission of Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 32 Ill. App. 3d 1052, 337 N. E. 2d 344.

No. 75-6793. Morrison *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75-6794. Taylor *v.* United States; and

No. 75-6795. Hicks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 639.

No. 75-6796. Marchesani *v.* McCune, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 531 F. 2d 459.

No. 75-6798. Little *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 534 F. 2d 329.

No. 75-6799. Daniels *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 326 So. 2d 340.

No. 75-6801. Wilson et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 641.

No. 75-6802. Williams *v.* Ward, Corrections Commissioner. C. A. 2d Cir. Certiorari denied.

No. 75-6803. Klimas *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 259 Ark. 301, 534 S. W. 2d 202.

No. 75-6804. Rosell *v.* Havener, Correctional Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75-6806. Todero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 334.

No. 75-6808. Perez et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 859.

No. 75-6810. Trujillo *v.* Stone, Correctional Superintendent. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 339.

No. 75-6812. Bear Killer *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 1253.

No. 75-6813. Bannister, aka Cuddy *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75-6814. Fratus *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 644.

No. 75-6816. WEILAND *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 1284.

No. 75-6817. SALVO *v.* AMERICAN INSTITUTE OF ARCHITECTS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 242, 530 F. 2d 1094.

No. 75-6818. PINKSTON *v.* WARDEN, STATEVILLE CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 980.

No. 75-6820. LOVE *v.* UNITED STATES; and
No. 75-6986. LYON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 1152.

No. 75-6821. McDANIEL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 75-6822. RAITPORT *v.* BANK & TRUST COMPANY OF OLD YORK ROAD ET AL. C. A. 3d Cir. Certiorari denied.

No. 75-6823. WATTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 1215.

No. 75-6825. MULLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 334.

No. 75-6826. HOYT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-6827. HOLLINS *v.* UNITED STATES; and
No. 75-6830. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 1371.

No. 75-6828. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 1062.

No. 75-6831. HENNING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 75-6833. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1157.

No. 75-6835. WYDMAN *v.* KENTUCKY PAROLE BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 528.

No. 75-6836. BISHOP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1156.

No. 75-6837. HARRIS *v.* DIRECTOR, MARYLAND DIVISION OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 75-6838. LEE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 51 App. Div. 2d 557, 378 N. Y. S. 2d 735.

No. 75-6840. MAGEE *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75-6841. HARRIEL *v.* STONE, WARDEN. C. A. 9th Cir. Certiorari denied

No. 75-6843. BRANT *v.* UNITED STATES. C. A. 3rd Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75-6844. BENAVIDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 573.

No. 75-6845. CARDEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 443.

No. 75-6846. BUCK *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 75-6848. O'REILLY ET AL. *v.* ROBERT STIGWOOD GROUP, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 530 F. 2d 1096.

No. 75-6850. GARRETT *v.* MOBIL OIL CORP. C. A. 8th Cir. Certiorari denied. Reported below: 531 F. 2d 892.

No. 75-6851. HAYNES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75-6854. Moore *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 342.

No. 75-6855. Tindle *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 363, 535 F. 2d 1325.

No. 75-6856. Sanchez *v.* Heggie, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 531 F. 2d 964.

No. 75-6857. Johnson *v.* Johnson et al. Ct. App. Mich. Certiorari denied.

No. 75-6858. Cox *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 326 So. 2d 794.

No. 75-6859. Klimko *v.* Virginia Employment Commission. Sup. Ct. Va. Certiorari denied. Reported below: 216 Va. 750, 222 S. E. 2d 559.

No. 75-6861. Lunz *v.* Smith, Correctional Superintendent. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 1322.

No. 75-6862. Lucchetti *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 28.

No. 75-6863. Bodek *v.* Department of the Treasury, Bureau of Public Debt. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 277.

No. 75-6864. Hurd *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 75-6865. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 6.

No. 75-6868. Dormu *v.* Walsh, Acting Chairman, Equal Employment Opportunity Commission, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 241, 530 F. 2d 1093.

No. 75-6869. WELD-HARRINGTON *v.* CASE WESTERN RESERVE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied.

No. 75-6871. SEPULVEDA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 338.

No. 75-6873. WILLIAMS *v.* HOWARD UNIVERSITY. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 85, 528 F. 2d 658.

No. 75-6874. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 521.

No. 75-6875. MCALISTER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 54 Cal. App. 3d 918, 126 Cal. Rptr. 881.

No. 75-6876. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75-6877. GARNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 962.

No. 75-6878. ANDERSON *v.* REED, PENITENTIARY SUPERINTENDENT. C. A. 5th Cir. Certiorari denied.

No. 75-6879. HILLS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 397.

No. 75-6880. TOWNSEND, AKA MURPHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75-6881. CHESTER *v.* UNITED STATES; and

No. 75-6882. REYNOLDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75-6885. SHEPPARD *v.* HUTTO, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 2d 449.

No. 75–6883. Sotelo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 75–6884. Armstead *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied.

No. 75–6886. Montilla *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 75–6887. Willis *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 75–6889. Gomori *v.* Arnold et al. C. A. 3d Cir. Certiorari denied. Reported below: 533 F. 2d 871.

No. 75–6890. Wright *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 75–6893. Vacendak *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 264 Ind. 101, 340 N. E. 2d 352.

No. 75–6896. Thanasouras *v.* Police Board, City of Chicago, et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 33 Ill. App. 3d 1012, 339 N. E. 2d 504.

No. 75–6897. Morgan *v.* Rees, Warden. C. A. 9th Cir. Certiorari denied.

No. 75–6899. Pierson *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied.

No. 75–6900. Robinson *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied.

No. 75–6903. Wooten *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 534 F. 2d 329.

No. 75–6906. Smith *v.* California. C. A. 9th Cir. Certiorari denied.

No. 75-6908. Iglesias-Contreras *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 75-6910. Apuzzo *v.* Robertson. Sup. Ct. Conn. Certiorari denied. Reported below: 170 Conn. 367, 365 A. 2d 824.

No. 75-6912. Robinson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 677.

No. 75-6913. Tyczkowski *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75-6915. Walsh *v.* New York. App. Term, Sup. Ct. N. Y., 2d and 11th Jud. Dists. Certiorari denied.

No. 75-6916. Chicoine *v.* Village of Mogadore. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1253.

No. 75-6918. Tarkowski *v.* Smart. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 980.

No. 75-6919. Clay *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 75-6920. Floyd *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 95, 522 F. 2d 1310; 175 U. S. App. D. C. 337, 535 F. 2d 1299.

No. 75-6921. Jones *v.* United States; and
No. 75-6946. Carter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 575.

No. 75-6922. Mason et al. *v.* Belieu et al. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 68, 543 F. 2d 215.

No. 75-6924. Gaye *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 520.

No. 75-6925. Hawkins *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

No. 75-6926. Cisternas-Estay et ux. *v.* Immigration and Naturalization Service. C. A. 3d Cir. Certiorari denied. Reported below: 531 F. 2d 155.

No. 75-6928. McColgin *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 2d 471.

No. 75-6929. Gardiner *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 2d 953.

No. 75-6930. Mackie *v.* United States. Ct. Cl. Certiorari denied.

No. 75-6934. Meagher, aka Mayher *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 752.

No. 75-6935. Dixon *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 57 Ala. App. 30, 325 So. 2d 546.

No. 75-6936. Dante *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: See 25 Ariz. App. 150, 541 P. 2d 941.

No. 75-6937. Perez *v.* Missouri. Sup. Ct. Mo. Certiorari denied.

No. 75-6938. Blackford *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 612.

No. 75-6941. White *v.* Hopper, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 75-6942. Mitchell et ux. *v.* Villager Industries, Inc. Sup. Ct. Del. Certiorari denied. Reported below: 355 A. 2d 888.

No. 75-6943. Thomas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 75-6947. Rangel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 147.

No. 75-6948. Poindexter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 75-6949. Cromwell, aka Howard *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 75-6950. In re Mayes. Ct. App. D. C. Certiorari denied.

No. 75-6951. Conklin *v.* Helgemoe, Warden. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 962.

No. 75-6952. Reale *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 1010, 529 F. 2d 533.

No. 75-6953. Williams *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 50 App. Div. 2d 805, 375 N. Y. S. 2d 856.

No. 75-6956. Cabrera *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 334.

No. 75-6958. Simmons *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 827.

No. 75-6959. Burden *v.* McKenney et al. C. A. 1st Cir. Certiorari denied. Reported below: 529 F. 2d 44.

No. 75-6960. Tobias *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 75-6961. Falkner et ux. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1350.

No. 75-6962. Woods *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 927.

No. 75-6963. Cohen *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 43.

No. 75-6964. Holland *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1373.

No. 75-6965. Robinson *v.* Brown, Superintendent of Education of Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 295 Ala. 297, 328 So. 2d 291.

No. 75-6966. McNally *v.* Pulitzer Publishing Co. et al. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 69.

No. 75-6970. Nurse *v.* United States. Ct. App. D. C. Certiorari denied.

No. 75-6972. Foster *v.* Cowan, Penitentiary Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1254.

No. 75-6973. Russell *v.* City of Pierre, South Dakota. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 791.

No. 75-6974. Williams *v.* LaVallee, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 75-6975. Schremp *v.* Hall et al. C. A. D. C. Cir. Certiorari denied.

No. 75-6977. Taylor et al. *v.* Taylor et al. Sup. Ct. Wyo. Certiorari denied. Reported below: 544 P. 2d 464.

No. 75-6978. Bates, dba Litchfield Steel Co. *v.* Shunk Manufacturing Co., Inc. Sup. Ct. Minn. Certiorari denied. Reported below: 307 Minn. 485, 238 N. W. 2d 619.

No. 75-6979. Meador *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 75-6982. Duffield *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-6983. Stokes *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 1258.

No. 75-6984. Krancberg *v.* Revlon Corp. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 746.

No. 75-6988. Kaup *v.* Gunn, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 336.

No. 75-6989. Wilson *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75-6991. Griffin *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 75-6993. Salisbury *v.* Southern New England Telephone Co., Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 313.

No. 75-6994. Woods *v.* Commissioner of Internal Revenue. C. A. 10th Cir. Certiorari denied.

No. 75-6995. Brown *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 363, 535 F. 2d 1325.

No. 75-6996. Sebastian *v.* United States et al. C. A. 8th Cir. Certiorari denied. Reported below: 531 F. 2d 900.

No. 75-6999. Calloway *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 75-7000. Smith *v.* Bordenkircher, Warden. C. A. 4th Cir. Certiorari denied.

No. 75-7002. Hicks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 841.

No. 75-7007. WHITE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75-7008. ROLLIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75-7009. LUCERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 342.

No. 75-7010. NEAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 533.

No. 75-7011. FOSTER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75-7013. BORUSKI *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 539 F. 2d 701.

No. 76-3. GOUGH, TRUSTEE IN BANKRUPTCY *v.* ROSSMOOR CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 453.

No. 76-4. SUN FINANCE & LOAN CO. *v.* KOSYDAR, TAX COMMISSIONER OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 45 Ohio St. 2d 283, 344 N. E. 2d 330.

No. 76-7. GENERES *v.* TITLE INSURANCE & TRUST CO. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76-9. KOLODZIEJ *v.* LOCAL 697, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 1257.

No. 76-12. UPTON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 236 Ga. 770, 225 S. E. 28 258.

No. 76-13. SNYDER, DBA J. S. N. Y., ET AL. *v.* L. BATLIN & SON, INC. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 486.

No. 76-16. ROSARIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 531 F. 2d 1227.

No. 76-14. City of Chicago et al. *v.* Shakman et al. C. A. 7th Cir. Certiorari denied. Reported below: 533 F. 2d 344.

No. 76-20. Warner et al. *v.* Board of Trustees of Police Pension Fund of New Orleans et al. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 505.

No. 76-26. Burnette *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: See 536 S. W. 2d 353.

No. 76-36. Yamaha International Corp. *v.* Whiteis, dba Motor Sports of Tulsa. C. A. 10th Cir. Certiorari denied. Reported below: 531 F. 2d 968.

No. 76-40. Bituminous Coal Operators' Assn., Inc., et al. *v.* Kleppe, Secretary of the Interior, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 328, 532 F. 2d 1403.

No. 76-41. Buchman et al. *v.* American Foam Rubber Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 530 F. 2d 450.

No. 76-42. Cassesso et al. *v.* Meachum, Warden, et al. C. A. 1st Cir. Certiorari denied. Reported below: 533 F. 2d 713.

No. 76-45. Money *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 137 Ga. App. 779, 224 S. E. 2d 783.

No. 76-48. Sanko Steamship Co., Ltd. *v.* Newfoundland Refining Co., Ltd., et al. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 313.

No. 76-49. Lischko *v.* Galli, Sheriff. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 333.

No. 76-50. Cincinnati Gas & Electric Co. *v.* Abel, dba New Richmond Boating Center. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 2d 1001.

No. 76-54. BOURGEOIS ET AL. *v.* SEAFARERS PENSION PLAN, AKA SEAFARERS WELFARE PLAN. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 973.

No. 76-59. HARRAH'S CLUB *v.* BERNHARD. Sup. Ct. Cal. Certiorari denied. Reported below: 16 Cal. 3d 313, 546 P. 2d 719.

No. 76-64. ALCO-GRAVURE, INC. *v.* BALTIMORE & ANNAPOLIS RAILROAD CO. ET AL.; and

No. 76-78. BALTIMORE & ANNAPOLIS RAILROAD CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 537 F. 2d 77.

No. 76-66. HALL ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 236 Ga. 770, 225 S. E. 2d 258.

No. 76-68. LEDFORD ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 336.

No. 76-69. WALSH, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (BURROUGHS CORP., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 76-76. TOPIC ET AL. *v.* CIRCLE REALTY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1273.

No. 76-80. TRUCKDRIVERS, CHAUFFEURS & HELPERS, LOCAL UNION No. 100, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 569.

No. 76-83. G. E. M. CORP., DBA GENE THOMAS CASCADE LOUNGE *v.* LIQUOR CONTROL COMMISSION OF OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 76–84. SECURITY MUTUAL CASUALTY Co. *v.* CENTURY CASUALTY Co. C. A. 10th Cir. Certiorari denied. Reported below: 531 F. 2d 974.

No. 76–91. SOUND SHIP BUILDING CORP. *v.* BETHLEHEM STEEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 533 F. 2d 96.

No. 76–92. AMERICAN HONDA MOTOR Co., INC. *v.* CITY OF FARMERS BRANCH ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 537 S. W. 2d 454.

No. 76–93. ROVIN SALES Co. *v.* BOGDAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 76–97. PETRYCKI *v.* YOUNGSTOWN & NORTHERN RAILROAD Co. C. A. 6th Cir. Certiorari denied. Reported below: 531 F. 2d 1363.

No. 76–102. RINGE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 782, 538 F. 2d 348.

No. 76–108. MCDANNALD *v.* LEAGUE CITY. Sup. Ct. Tex. Certiorari denied.

No. 76–109. STEPHENS *v.* UNITED STATES; and

No. 75–6809. BRACKEEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1256.

No. 76–110. PARK CITY UTAH CORP. *v.* RUSSELL ET UX. Sup. Ct. Utah. Certiorari denied. Reported below: 548 P. 2d 889.

No. 76–111. SALVUCCI *v.* NEW HAMPSHIRE JOCKEY CLUB, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 962.

No. 76–114. SANTIAGO *v.* SUPREME COURT OF NEW YORK, KINGS COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–116. STUART *v.* BUTLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 339.

No. 76-117. Mitchell et al. *v.* Ingram, Commissioner of Education of Tennessee, et al. Sup. Ct. Tenn. Certiorari denied.

No. 76-119. Pickens *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied.

No. 76-121. Scott Paper Co. *v.* Watkins et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1159.

No. 76-125. American Electro-Coatings, Inc. *v.* Ransburg Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1253.

No. 76-131. Hynning et al. *v.* Baker et al. Sup. Ct. Va. Certiorari denied.

No. 76-133. Fruehauf Corp. *v.* Truck Equipment Service Co. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 1210.

No. 76-139. Shell Oil Co. et al. *v.* Gas-A-Tron of Arizona et al. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 1322.

No. 76-144. Matsushita Electric Corporation of America *v.* City of Farmers Branch et al. Sup. Ct. Tex. Certiorari denied. Reported below: 537 S. W. 2d 452.

No. 76-146. Burns et al. *v.* City of Des Peres et al. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 103.

No. 76-148. Block *v.* Consino et al. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 1165.

No. 76-150. Bravy et al. *v.* Tully, Commissioner, Department of Taxation and Finance of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 308.

No. 76-151. GLANTZ v. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 50 App. Div. 2d 394, 378 N. Y. S. 2d 393.

No. 76-155. ALLIED WITAN CO. v. ARO CORP. C. A. 6th Cir. Certiorari denied. Reported below: 531 F. 2d 1368.

No. 76-168. TERMAR NAVIGATION CO., INC. v. THE POLANICA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1166.

No. 76-170. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 701 v. H. A. ANDERSEN CO., INC., ET AL. Temp. Emerg. Ct. App. Certiorari denied.

No. 76-172. KENNEDY ET AL. v. LEMON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1246.

No. 76-173. DAILY MIRROR, INC. v. NEW YORK NEWS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 53.

No. 76-192. BARKER & BRATTON STEEL WORKS, INC. v. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 184.

No. 76-258. BLOOM, ACTING COMPTROLLER OF THE CURRENCY v. INDEPENDENT BANKERS ASSOCIATION OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 184, 534 F. 2d 921.

No. 76-5002. MARTIN v. UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 535.

No. 76-5007. RAFERTY (RAFTREY) v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 854.

No. 76-5010. ZATKO v. IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 76-5011. Chown *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 340.

No. 76-5012. Crossland *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1240.

No. 76-5013. Bailey *v.* Alabama. C. A. 5th Cir. Certiorari denied.

No. 76-5015. DeYoung *v.* Minnesota Department of Highways et al. Sup. Ct. Minn. Certiorari denied. Reported below: 308 Minn. 158, 241 N. W. 2d 310.

No. 76-5017. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 344.

No. 76-5018. Butler *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 330 So. 2d 244.

No. 76-5019. Robinson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1258.

No. 76-5021. Feingold *v.* Feingold. Super. Ct. Pa. Certiorari denied.

No. 76-5022. Brewster *v.* Florida. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1373.

No. 76-5023. Boeckenhaupt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 537 F. 2d 1182.

No. 76-5024. Moreno *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 573.

No. 76-5027. Ginter *v.* Wisconsin. C. A. 7th Cir. Certiorari denied.

No. 76-5028. Ramirez-Rico *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 343.

No. 76-5030. BLACKBURN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 314 So. 2d 634.

No. 76-5032. FORTUNE ET AL. *v.* MULHERRIN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 533 F. 2d 21.

No. 76-5033. BATEMAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 113 Ariz. 107, 547 P. 2d 6.

No. 76-5036. MAYS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 329 So. 2d 65.

No. 76-5038. HAYNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 76-5039. PROSPARE WALTER L. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-5045. SIMMONS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 76-5047. PEREZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 76-5048. PUTMON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 683.

No. 76-5052. JACOBSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 793.

No. 76-5057. SCHERER *v.* POGUE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 76-5059. ZAPATA *v.* WERNER, CORRECTIONS COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 322.

No. 76-5061. CAMPBELL *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 76-5060. Gasaway *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 137 Ga. App. 653, 224 S. E. 2d 772.

No. 76-5068. Tyler et ux. *v.* Westinghouse Electric Corp. Sup. Ct. Va. Certiorari denied.

No. 76-5078. Manning *v.* Princeton Consumer Discount Co., Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 533 F. 2d 102.

No. 76-5079. Stone *v.* Schmidt et al. C. A. 7th Cir. Certiorari denied. Reported below: 534 F. 2d 766.

No. 76-5087. Ochenkowski *v.* Corona Lighting Corp. Super. Ct. N. J. Certiorari denied.

No. 76-5098. Carter *v.* Dolce et al. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1373.

No. 76-5111. Bragg *v.* Sinclair Refining Co. et al. C. A. 7th Cir. Certiorari denied.

No. 76-5118. Wolf *v.* Brivic et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 50 App. Div. 2d 539, 375 N. Y. S. 2d 1018.

No. 76-5123. Ochenkowski *v.* Russell's Auto Body. Sup. Ct. N. J. Certiorari denied.

No. 76-5127. White *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5131. Bryan *v.* Jones, Sheriff, et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1210.

No. 76-5134. Hohensee *v.* Muir. C. A. 3d Cir. Certiorari denied.

No. 76-5141. Williams *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 170 Conn. 618, 368 A. 2d 140.

No. 76-5149. FREEMAN *v.* GRABHAM ET AL. Sup. Ct. Ind. Certiorari denied.

No. 76-5159. BUTCHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 76-5162. CHAMBERS ET AL. *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1373.

No. 76-5165. HOHENSEE *v.* TIGUE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 964.

No. 76-5173. GRIGGS *v.* KLOSS ET AL. C. A. 9th Cir. Certiorari denied.

No. 75-1416. PEVAR *v.* ROBERTS ET AL. Sup. Ct. Del. Motion of respondent Donald A. Roberts for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 349 A. 2d 866.

No. 75-1425. NORTHERN HELEX CO. *v.* UNITED STATES. Ct. Cl. Motion of the Bar Association of the District of Columbia for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 207 Ct. Cl. 862, 524 F. 2d 707.

No. 75-1468. M. MORRIN & SON CO., INC. *v.* BURGESS CONSTRUCTION CO. ET AL. C. A. 10th Cir. Motion of Utah Chapter of Associated General Contractors of America for leave to file a brief as *amicus curiae* granted. Motions of Colorado Contractors Assn., Inc., and Associated General Contractors of Wyoming, Inc., for leave to file briefs as *amici curiae* denied. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these motions and this petition. Reported below: 526 F. 2d 108.

No. 75-1502. Ecee, Inc., et al. *v.* Federal Power Commission. C. A. 5th Cir. Certiorari denied. Mr. Justice Stewart took no part in the consideration or decision of this petition. Reported below: 526 F. 2d 1270.

No. 75-1853. Boise Cascade Corp. et al. *v.* United States. Ct. Cl. Certiorari denied. Mr. Justice Stewart took no part in the consideration or decision of this petition. Reported below: 208 Ct. Cl. 619, 530 F. 2d 1367.

No. 75-1871. General Foods Corp. *v.* United States. Ct. Cl. Certiorari denied. Mr. Justice Stewart took no part in the consideration or decision of this petition. Reported below: 208 Ct. Cl. 606, 530 F. 2d 923.

No. 75-1533. Canada *v.* United States. C. A. 9th Cir. Motion of Anne Belle Welsh for leave to join in petition for certiorari denied. Motion to strike brief for respondent and certiorari denied. Reported below: 527 F. 2d 1374.

No. 75-1545. Kansas *v.* McCorgary. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 218 Kan. 358, 543 P. 2d 952.

No. 75-1616. Robinson, Warden *v.* Chesney. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 538 F. 2d 308.

No. 75-1724. Superior Court of New Hampshire, Rockingham County *v.* Royal. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 531 F. 2d 1084.

No. 75-1764. Aytch, Prisons Superintendent *v.* Walton. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 466 Pa. 172, 352 A. 2d 4.

No. 76-47. New York *v.* Baker. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 39 N. Y. 2d 923, 352 N. E. 2d 879.

No. 76-189. Wyrick, Warden *v.* Thomas. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 535 F. 2d 407.

No. 75-1556. Public Service Commission of New York *v.* Federal Power Commission et al.; and

No. 75-1565. Associated Gas Distributors *v.* Federal Power Commission et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of these petitions. Reported below: 177 U. S. App. D. C. 389, 543 F. 2d 874.

No. 75-1620. Gilmore *v.* Weyerhaeuser Co. et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Stewart and Mr. Justice Blackmun would grant certiorari. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 528 F. 2d 957.

No. 75-1621. Slovak *v.* Administrator, Federal Aviation Administration. C. A. D. C. Cir. Motion to strike memorandum for respondent and certiorari denied. Reported below: 173 U. S. App. D. C. 129, 522 F. 2d 1344.

No. 75-1622. Baton Rouge Marine Contractors, Inc. *v.* Federal Maritime Commission et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 174 U. S. App. D. C. 210, 530 F. 2d 1062.

No. 75-1865. Carnes et al. *v.* Smith et al. Sup. Ct. Ga. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 236 Ga. 30, 222 S. E. 2d 322.

No. 76-5166. Smith, Administratrix *v.* Emory University et al. Ct. App. Ga. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 137 Ga. App. 785, 225 S. E. 2d 63.

No. 75-1642. Abrams *v.* Community Redevelopment Agency of Los Angeles. Sup. Ct. Cal. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 15 Cal. 3d 813, 543 P. 2d 905.

No. 75-1716. Blanchard et al. *v.* Johnson et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 532 F. 2d 1074.

No. 76-160. Marine Development Corp. *v.* Heiman et al.; and

No. 76-161. Medlin Marine, Inc. *v.* Heiman et al. C. A. 8th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 534 F. 2d 332.

No. 75-1664. DuFault et al., dba Dimension *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting:

Petitioners were convicted of mailing obscene materials in violation of 18 U. S. C. § 1461. I adhere to the view that this statute is "'clearly overbroad and unconstitutional on its face,'" see, *e. g., Millican* v. *United States,* 418 U. S. 947, 948 (1974) (Brennan, J., dissenting from denial of certiorari), quoting *United States* v. *Orito,* 413 U. S. 139, 148 (1973) (Brennan, J., dissenting). I therefore would grant certiorari and reverse.

No. 75-1731. Carter *v.* American Bar Assn. et al. C. A. 1st Cir. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition.

No. 75-1678. FEDERAL POWER COMMISSION *v.* MISSISSIPPI PUBLIC SERVICE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL would grant certiorari. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 522 F. 2d 1345.

No. 75-6791. SENTER *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 532 F. 2d 511.

No. 75-1743. DOYLE ET AL. *v.* SHEEHAN. C. A. 1st Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 529 F. 2d 38.

No. 75-1744. E-T INDUSTRIES, INC. *v.* WHITTAKER CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 523 F. 2d 636.

No. 75-1786. FEED SERVICE CORP. *v.* KENT FEEDS, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 528 F. 2d 756.

No. 76-57. FIRST NATIONAL BANK OF CHICAGO *v.* GOLDMAN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 532 F. 2d 10.

No. 75-1759. JOHNSON, A MINOR, BY MILLER *v.* WHITTIER, COMMISSIONER OF EDUCATION OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 75-1801. NORTH CAROLINA *v.* CHAS. PFIZER & CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 537 F. 2d 67.

No. 75–1832. Mitchell et ux. *v.* Ford Motor Co. C. A. 1st Cir. Motion for certification of question of law to the Supreme Court of New Hampshire and certiorari denied. Reported below: 533 F. 2d 19.

No. 75–1900. Continental Illinois National Bank & Trust Company of Chicago *v.* Lignoul, Commissioner of Banks and Trust Companies of Illinois; and

No. 76–17. First National Bank of Chicago *v.* Lignoul, Commissioner of Banks and Trust Companies of Illinois. C. A. 7th Cir. Motion of Independent Community Banks in Illinois for leave to file a brief as *amicus curiae* in No. 75–1900 granted. Certiorari denied. Reported below: 536 F. 2d 176.

No. 75–1909. Lucas et al. *v.* Rivers; and

No. 75–6792. Rivers *v.* Lucas et al. C. A. 6th Cir. Motion of respondent in No. 75–1909 for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75–1920. United States *v.* Long et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant certiorari. Reported below: 537 F. 2d 1151.

No. 75–6641. Palmer *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant certiorari. Reported below: 62 Ill. 2d 261, 342 N. E. 2d 353.

No. 75–6642. Vickers *v.* McKenzie, Warden. Sup. Ct. App. W. Va. Certiorari denied. Mr. Justice Brennan would grant certiorari.

No. 75–6782. Douglas *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 328 So. 2d 18.

Mr. Justice Brennan, dissenting.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. I would therefore grant certiorari in this case and vacate the judgment insofar as it leaves undisturbed the death sentence imposed.

MR. JUSTICE MARSHALL, dissenting.

Because I consider the death penalty to be a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant certiorari in this case and vacate the judgment insofar as it leaves undisturbed the sentence of death.

No. 75-6824. JAMES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 350 A. 2d 748.

No. 76-28. GOLDEN ET AL. *v.* BISCAYNE BAY YACHT CLUB ET AL. C. A. 5th Cir. Motion of Anti-Defamation League of B'nai B'rith for leave to file a brief as *amicus curiae* and certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 530 F. 2d 16.

No. 76-71. LOS ANGELES TIMES, A DIVISION OF TIMES MIRROR CO., ET AL. *v.* HARTLEY. Ct. App. Cal., 2d App. Dist. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* granted. It appearing that the judgment of the court below is not final as required by 28 U. S. C. § 1257, certiorari denied.

No. 76-5016. BUNTS *v.* UNITED STATES. C. A. 9th Cir. Motions of Larry Joseph Rouse and Antonio Alanis Lopes, Jr., for leave to join in petition for certiorari and certiorari denied.

*Rehearing Denied*

No. 74–1488. KLEPPE, SECRETARY OF THE INTERIOR *v.* NEW MEXICO ET AL., 426 U. S. 529;

No. 74–1542. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL., 427 U. S. 246;

No. 74–5196. HOUSE *v.* GEORGIA, 428 U. S. 910;

No. 74–6168. HALLMAN *v.* FLORIDA, 428 U. S. 911;

No. 74–6207. ROSS *v.* GEORGIA, 428 U. S. 910;

No. 74–6377. SULLIVAN *v.* FLORIDA, 428 U. S. 911;

No. 74–6547. MOORE *v.* GEORGIA, 428 U. S. 910;

No. 74–6557. MCCORQUODALE *v.* GEORGIA, 428 U. S. 910;

No. 74–6563. SAWYER *v.* FLORIDA, 428 U. S. 911;

No. 74–6717. ALFORD *v.* FLORIDA, 428 U. S. 912;

No. 74–6736. JARRELL *v.* GEORGIA, 428 U. S. 910;

No. 75–252. MEACHUM, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* FANO ET AL., 427 U. S. 215;

No. 75–292. SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES AND CANADA ET AL. *v.* MILIVOJEVICH ET AL., 426 U. S. 696;

No. 75–312. YOUNG, MAYOR OF DETROIT, ET AL. *v.* AMERICAN MINI THEATRES, INC., ET AL., 427 U. S. 50;

No. 75–928. ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* JUSTICE, U. S. DISTRICT JUDGE, ET AL., 426 U. S. 925;

No. 75–974. WEST PENN POWER CO. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, 426 U. S. 947;

No. 75–1162. WINTERS BATTERY MANUFACTURING CO. *v.* USERY, SECRETARY OF LABOR, 425 U. S. 991;

No. 75–1219. SEXTON *v.* SIMON, SECRETARY OF THE TREASURY, ET AL., 425 U. S. 973;

No. 75–1233. REA EXPRESS, INC. *v.* CIVIL AERONAUTICS BOARD ET AL., 426 U. S. 906;

No. 75–1363. ALESSIO *v.* UNITED STATES, 426 U. S. 948;

No. 75–1429. YEE *v.* YEE ET AL., 426 U. S. 911; and

No. 75–1466. BOSTON HOME & SCHOOL ASSN. *v.* MORGAN ET AL., 426 U. S. 935. Petitions for rehearing denied.

No. 75–1477. Little et al. *v.* Oklahoma et al., 427 U. S. 904;

No. 75–1480. Bannert *v.* American Can Co., 426 U. S. 942;

No. 75–1550. Vorbeck et al. *v.* McNeal et al., 426 U. S. 943;

No. 75–1592. Davis *v.* Davis, 426 U. S. 943;

No. 75–1608. Whitney *v.* Brann et vir, 426 U. S. 922;

No. 75–5022. Mitchell *v.* Georgia, 428 U. S. 910;

No. 75–5209. Spenkelink *v.* Florida, 428 U. S. 911;

No. 75–5817. Smith *v.* Estelle, Corrections Director, 427 U. S. 905;

No. 75–6250. Smith, aka Machetti *v.* Georgia, 428 U. S. 910;

No. 75–6483. Jackson *v.* United States, 426 U. S. 951;

No. 75–6536. Mason *v.* Georgia, 428 U. S. 910;

No. 75–6577. Corto *v.* California, 426 U. S. 910;

No. 75–6596. Alvord *v.* Florida, 428 U. S. 923;

No. 75–6605. White *v.* Guild, 426 U. S. 915;

No. 75–6653. Pulliam *v.* Georgia, 428 U. S. 911;

No. 75–6666. Hohensee et al. *v.* Grier et al., 426 U. S. 940;

No. 75–6669. Mitchell *v.* New Hampshire, 426 U. S. 940; and

No. 75–6787. Mayola *v.* Alabama, 426 U. S. 933. Petitions for rehearing denied.

No. 74–958. United States et al. *v.* Janis, 428 U. S. 433; and

No. 75–1558. National Hockey League et al. *v.* Metropolitan Hockey Club, Inc., et al., 427 U. S. 639. Petitions for rehearing denied. Mr. Justice Stevens took no part in the consideration or decision of these petitions.

No. 74–1055. Stone, Warden *v.* Powell, 428 U. S. 465; and

No. 74–1222. Wolff, Warden *v.* Rice, 428 U. S. 465. Petitions for rehearing and/or modification denied.

No. 74-6257. **Gregg** *v.* **Georgia**, 428 U. S. 153;

No. 75-5394. **Jurek** *v.* **Texas**, 428 U. S. 262; and

No. 75-5706. **Proffitt** *v.* **Florida**, 428 U. S. 242. Petitions for rehearing denied. Order entered by Mr. Justice Powell on July 22, 1976, staying issuance of mandates in these cases is vacated.

No. 75-510. **Flint Ridge Development Co.** *v.* **Scenic Rivers Association of Oklahoma et al.**, 426 U. S. 776;

No. 75-545. **Hills, Secretary of Housing and Urban Development, et al.** *v.* **Scenic Rivers Association of Oklahoma et al.**, 426 U. S. 776; and

No. 75-1015. **Ralston Purina Co. et al.** *v.* **Louisville & Nashville Railroad Co. et al.**, 426 U. S. 476. Petitions for rehearing denied. Mr. Justice Powell took no part in the consideration or decision of these petitions.

No. 75-1294. **Bohack Corp.** *v.* **General Warehousemen's Union, Local No. 852**, 425 U. S. 966; and

No. 75-6432. **Rocha** *v.* **United States**, 426 U. S. 923. Motions for leave to file petitions for rehearing denied.

No. 75-1348. **Gustin** *v.* **Stegall et al.**, 425 U. S. 974. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

*Assignment Order*

An order of The Chief Justice designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Third Circuit for the purpose of hearing the following cases: *Hartman* v. *Rosenlieb; Hartman* v. *United States; Brobeck* v. *United States; Hartman* v. *Alexander; United States* v. *Adams; Bowser* v. *Commissioner of Internal Revenue;* and *Cupp* v. *Commissioner of Internal Revenue,* and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

## OCTOBER 5, 1976

*Certiorari Denied*

No. 76-484. McCARTHY ET AL. *v.* CARTER ET AL.; and McCARTHY *v.* FEDERAL COMMUNICATIONS COMMISSION. Petition for certiorari before judgment to C. A. D. C. Cir. denied.

## OCTOBER 6, 1976

*Dismissal Under Rule 60*

No. 75-1894. UNITED MINE WORKERS OF AMERICA ET AL. *v.* WINDSOR POWER HOUSE COAL CO. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 530 F. 2d 312.

*Miscellaneous Order*

No. A-269. FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS. Sup. Ct. Jud. Mass. Application for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

## OCTOBER 12, 1976

*Affirmed on Appeal*

No. 75-1572. APACHE COUNTY ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Ariz. Reported below: 417 F. Supp. 13.

No. 75-1911. AHEARN ET AL. *v.* DI GRAZIA, POLICE COMMISSIONER OF BOSTON. Affirmed on appeal from D. C. Mass. Reported below: 412 F. Supp. 638.

No. 76-224. SILVERMAN, ADMINISTRATOR, ET AL. *v.* BROWNING ET AL. Affirmed on appeal from D. C. Conn. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 414 F. Supp. 80.

*Appeals Dismissed*

No. 75–1446. CHARGER INVESTMENTS, INC., DBA SQUIRE, ET AL. *v.* CORBETT, CHIEF OF POLICE OF REVERE, ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for failure to file notice of appeal within time provided by this Court's Rule 11 and 28 U. S. C. § 2101. Reported below: 369 Mass. 138, 338 N. E. 2d 816.

No. 75–1815. GABRIEL *v.* UNITED STATES ET AL. Appeal from D. C. N. J. dismissed for failure to file notice of appeal within time provided by this Court's Rule 11 and 28 U. S. C. § 2101. Reported below: 416 F. Supp. 810.

No. 75–6583. RIVERA *v.* DELAWARE. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 351 A. 2d 561.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Appellant was convicted by a jury of murder in the second degree, in Delaware Superior Court. The Delaware Supreme Court reversed and remanded with instructions to strike the murder conviction but to enter a judgment of conviction for manslaughter; the constitutionality of a Delaware statute that requires a criminal defendant raising an insanity defense to prove mental illness or defect by a preponderance of the evidence was sustained. The relevant sections of the Delaware Code provide:

> "§ 401. Defendant's mental illness or mental defect . . . .
>
> "(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient willpower to choose whether he would do the act or refrain from doing it.

> "(b) If the defendant prevails in establishing the affirmative defense provided in subsection (a) of this section, the trier of facts shall return a verdict of 'not guilty by reason of insanity.'"
>
> "§ 304. Defendant's affirmative defenses; prove by preponderance of evidence.
>
> "(a) When a defense declared by this Criminal Code or by another statute to be an affirmative defense is raised at trial, the defendant has the burden of establishing it by a preponderance of the evidence." Del. Code Ann., Tit. 11, § 401 (1975).

The Delaware Supreme Court held that *Leland* v. *Oregon,* 343 U. S. 790 (1952), required its conclusion, because *Leland* "has not been overruled by *Mullaney* [v. *Wilbur,* 421 U. S. 684 (1975)], . . . either expressly or implicitly." 351 A. 2d 561, 562 (1976). Because I believe this case presents the substantial federal question whether *Leland* can be reconciled with our recent holdings in *In re Winship,* 397 U. S. 358 (1970), and *Mullaney* v. *Wilbur, supra,* I would note probable jurisdiction and set the case for oral argument.

In *Mullaney,* we considered a Maine rule that placed upon a criminal defendant charged with murder the burden of proving by a preponderance of the evidence that he had acted in the heat of passion on sudden impulse in order to reduce the homicide to manslaughter. We concluded that this rule did not comport with the due process requirement, as defined in *In re Winship, supra,* at 361–364, that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In reaching this conclusion, my Brother POWELL's opinion for the Court pointed out that, in 1895, this Court considered and conclusively rejected the practice, accepted in several jurisdictions, of requiring the defendant to negate the presumption that he acted with malice aforethought. 421 U. S., at 694–696. *Davis* v. *United States,* 160 U. S. 469 (1895), the decision referred to, held in the context of a federal murder prosecution that the prosecution must shoulder the burden of proving the accused was sane at the time of the commission of the crime. This was so, the Court concluded, because "the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts." *Id.*, at 485. It is thus clear, following *Davis*, at least in the context of federal criminal procedure, that the accused's sanity is an ingredient of *mens rea*, an element of the crime which the prosecution must prove beyond a reasonable doubt.

*Leland* v. *Oregon* presented the same question in the context of a state rule requiring an accused to prove his insanity beyond a reasonable doubt. *Leland* refused to extend the holding of *Davis* to the States based on reluctance "to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." 343 U. S., at 799. In effect, the Court concluded that *Davis* was not a constitutional holding, but rather prescribed a policy necessary to achieve uniformity in federal prosecutions. 343 U. S., at 797-798.

My Brother REHNQUIST's concurring opinion in *Mullaney*, in which THE CHIEF JUSTICE joined, would distinguish *Leland* on the basis that the issue of insanity as a defense to a criminal charge is considered by the jury only *after* it has found that all elements of the offense, including *mens rea*, are proved beyond a reasonable doubt. Although that concurring opinion concedes that "evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, [it states that] the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." 421 U. S., at 705-706.

I do not think that the logic of this view is self-evident.

Like the state rule invalidated in *Mullaney,* which implied malice unless the accused negated it, the plea of insanity, whether or not the State chooses to characterize it as an affirmative defense, relates to the accused's state of mind, an essential element of the crime, and bears upon the appropriate form of punishment. Nor is it sufficient after *Mullaney* to say, as the Court did in *Leland,* that a State may characterize the insanity defense as it chooses. We said in *Mullaney* that the requirement of *Winship* that the State prove all elements of the crime was one of substance, not limited to "a State's definition of the elements of a crime . . . ." 421 U. S., at 699 n. 24.

The Court's summary disposition of this case is especially inappropriate since *Hicks* v. *Miranda,* 422 U. S. 332 (1975), accords that disposition precedential weight. See also *Colorado Springs Amusements* v. *Rizzo,* 428 U. S. 913 (1976) (BRENNAN, J., dissenting). Given the transparent erosion of *Leland* by *Winship* and *Mullaney,* the question whether *Leland* has continuing validity surely merits full briefing and oral argument.

No. 76–5248. MARTINEZ *v.* BUCYRUS-ERIE CO. ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question. Reported below: 113 Ariz. 119, 547 P. 2d 473.

*Vacated and Remanded on Appeal*

No. 75–1628. THELKELD ET AL. *v.* ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, ET AL. Appeal from Sup. Ct. Minn. Judgment vacated and case remanded for further consideration in light of Chapter 102 of 1976 Session Laws of Minnesota. *Fusari* v. *Steinberg,* 419 U. S. 379 (1975); *Diffenderfer* v. *Central Baptist Church,* 404 U. S. 412 (1972). Reported below: 307 Minn. 96, 239 N. W. 2d 437.

*Certiorari Granted—Reversed and Remanded.* (See No. 75–1667, *ante,* p. 10; and No. 75–1867, *ante,* p. 14.)

*Certiorari Granted—Vacated and Remanded.* (See also No. 75–1534, *ante*, p. 1; No. 75–1535, *ante*, p. 5; and No. 75–1547, *ante*, p. 6.)

No. 75–1782. AFW FABRIC CORP. ET AL. *v.* MARSHEL ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded to consider whether case is moot. Reported below: 533 F. 2d 1277 and 1309.

*Miscellaneous Orders*

No. 74–1589. GENERAL ELECTRIC CO. *v.* GILBERT ET AL.; and

No. 74–1590. GILBERT ET AL. *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. [Certiorari granted, 423 U. S. 822.] Motion of Barnes Hospital for leave to file a brief as *amicus curiae* denied.

No. 75–442. POELKER, MAYOR OF ST. LOUIS, ET AL. *v.* DOE. C. A. 8th Cir. [Certiorari granted, 428 U. S. 909]; and

No. 75–1440. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT *v.* ROE ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 428 U. S. 908.] Motion of American Public Health Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 75–503. COOK ET AL. *v.* HUDSON ET AL. C. A. 5th Cir. [Certiorari granted, 424 U. S. 941.] Motion of petitioners for divided argument denied.

No. 75–636. INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* UNITED STATES ET AL.; and

No. 75–672. T. I. M. E.–DC, INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. [Certiorari granted, 425 U. S. 990.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 75–708. MARKS ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 424 U. S. 942.] Motion of Citizens for Decency Through Law, Inc., for leave to file a brief as *amicus curiae* denied.

No. 75-804. Farmer *v.* United Brotherhood of Carpenters & Joiners of America, Local 25, et al. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *sub nom. Hill* v. *United Brotherhood of Carpenters & Joiners of America, Local 25, et al.*, 423 U. S. 1086.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Petitioner also alloted 15 additional minutes for oral argument.

No. 75-909. Environmental Protection Agency *v.* Brown, Governor of California, et al.; and Environmental Protection Agency *v.* Arizona et al. C. A. 9th Cir.;

No. 75-960. Environmental Protection Agency *v.* Maryland et al. C. A. 4th Cir.;

No. 75-1050. Virginia ex rel. Air Pollution Control Board *v.* Train, Administrator, Environmental Protection Agency. C. A. D. C. Cir.; and

No. 75-1055. Train, Administrator, Environmental Protection Agency *v.* District of Columbia et al. C. A. D. C. Cir. [Certiorari granted, 426 U. S. 904.] Motion of Natural Resources Defense Council, Inc., for leave to file a brief as *amicus curiae* denied.

No. 75-1064. Kremens, Hospital Director, et al. *v.* Bartley et al. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 424 U. S. 964.] Motion for reconsideration of denial of leave to file an *amicus curiae* brief on behalf of the Supreme Court of Pennsylvania granted, and it is ordered that the motion for leave to file be granted and the brief filed.

No. 76-188. Gourley, Director, Division of Family Services of Missouri, et al. *v.* Lewis. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 76-239. Bamford et al. *v.* Garrett et al. C. A. 3d Cir. Motion of Pennsylvania State Association of County Commissioners for leave to file a brief as *amicus curiae* denied.

No. 76-5317. Green *v.* Wyrick, Warden;

No. 76-5369. White et al. *v.* Henderson, Warden; and

No. 76-5379. Grismore *v.* Putnam, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

*Probable Jurisdiction Noted*

No. 75-1868. National Geographic Society *v.* California Board of Equalization. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. The Chief Justice took no part in the consideration or decision of this matter. Reported below: 16 Cal. 3d 637, 547 P. 2d 458.

No. 76-180. Smith, Administrator, New York City Human Resources Administration, et al. *v.* Organization of Foster Families for Equality & Reform et al.;

No. 76-183. Shapiro, Executive Director, New York State Board of Social Welfare, et al. *v.* Organization of Foster Families for Equality & Reform et al.;

No. 76-5193. Rodriguez et al. *v.* Organization of Foster Families for Equality & Reform et al.; and

No. 76-5200. Gandy et al. *v.* Organization of Foster Families for Equality & Reform et al. Appeals from D. C. S. D. N. Y. Motions of appellants for leave to proceed *in forma pauperis* in Nos. 76-5193 and 76-5200 granted. Probable jurisdiction noted, cases consolidated, and a total of one and one-half hours allotted for oral argument. Reported below: 418 F. Supp. 277.

*Certiorari Granted*

No. 75-1578. Wainwright, Secretary, Department of Offender Rehabilitation of Florida *v.* Sykes. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 528 F. 2d 522.

No. 75–1844. United States *v.* Lovasco. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 532 F. 2d 59.

*Certiorari Denied*

No. 75–1450. Department of Social Services of Iowa et al. *v.* West Height Manor, Inc.; and Burns, Commissioner, Department of Social Services of Iowa, et al. *v.* Hutchison Nursing Home, Inc., et al. Sup. Ct. Iowa. Certiorari denied. Reported below: 236 N. W. 2d 307 (first case) and 312 (second case).

No. 75–1531. White *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75–1597. Brown et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1256.

No. 75–1606. Lacy *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75–1685. Kolios *v.* Immigration and Naturalization Service. C. A. 1st Cir. Certiorari denied. Reported below: 532 F. 2d 786.

No. 75–1852. Banks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1336.

No. 75–1869. Chittenden *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 41.

No. 75–6849. Horan *v.* Wallace. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 241, 530 F. 2d 1093.

No. 75–6945. Nicholson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 342.

No. 75–6997. Ramirez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 138.

No. 76–33. Atkinson et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 706.

No. 76–58. Sloan et al. *v.* Securities and Exchange Commission et al. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 676.

No. 76–70. Street *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 76–82. Famous Foods, Inc. *v.* General Foods Corp. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 319.

No. 76–90. Western Shoshone Legal Defense & Education Assn. et al. *v.* United States et al. Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 43, 531 F. 2d 495.

No. 76–115. Bernabei *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 329.

No. 76–129. Levy *v.* United States. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 97, 535 F. 2d 47.

No. 76–132. Michelman, Trustee in Bankruptcy *v.* Clark-Schwebel Fiber Glass Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 1036.

No. 76–147. Williams *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 76–178. Scarrella et al. *v.* Midwest Federal Savings & Loan Association of Minneapolis et al. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 1207.

No. 76–182. Beneficial Finance Co. of Gary, Inc. *v.* Allen. C. A. 7th Cir. Certiorari denied. Reported below: 531 F. 2d 797.

No. 76–187. Bache & Co., Inc. *v.* Seymour. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 313.

No. 76-193. Moritt *v.* Nadjari et al. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 312.

No. 76-196. Brabant *v.* City of Seattle et al. Sup. Ct. Wash. Certiorari denied. Reported below: 86 Wash. 2d 698, 548 P. 2d 320.

No. 76-197. Mohasco Industries, Inc., et al. *v.* Spound et al. C. A. 1st Cir. Certiorari denied. Reported below: 534 F. 2d 404.

No. 76-218. Silvola *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 190 Colo. 363, 547 P. 2d 1283.

No. 76-219. International Telephone & Telegraph Corp. *v.* Raychem Corp. C. A. 1st Cir. Certiorari denied. Reported below: 538 F. 2d 453.

No. 76-223. Lane *v.* Lane. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 35 Ill. App. 3d 276, 340 N. E. 2d 705.

No. 76-225. Reinhart *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 466 Pa. 591, 353 A. 2d 848.

No. 76-233. Otto *v.* City of Dayton. Sup. Ct. Ohio. Certiorari denied.

No. 76-236. Sherard *v.* Shelton, Director, Wayne County Department of Social Services. Sup. Ct. Mich. Certiorari denied.

No. 76-240. Ryder *v.* Dallas & Mavis Forwarding Co., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 320.

No. 76-243. Allied Chemical Corp. et al. *v.* Daiflon, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 534 F. 2d 221.

No. 76-244. UNITED PACIFIC INSURANCE CO. *v.* MGM GRAND HOTEL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 486.

No. 76-247. GRUSS ET AL. *v.* CURTIS PUBLISHING CO. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 1396.

No. 76-250. FATHER FLANAGAN'S BOYS' HOME *v.* MILLARD SCHOOL DISTRICT ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 196 Neb. 299, 242 N. W. 2d 637.

No. 76-282. SMART *v.* JONES, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 64.

No. 76-5003. TUCKER *v.* GRAY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 329.

No. 76-5009. ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 76-5020. SCHERER *v.* THOMPSON, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 76-5049. BALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76-5058. SHADD *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1247.

No. 76-5064. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1239.

No. 76-5066. THOMPSON *v.* HARDING ET AL. C. A. 3d Cir. Certiorari denied.

No. 76-5067. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76-5070. HANKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 76-5071. GELLIS *v.* GROOMS, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 813.

No. 76-5074. BURKE *v.* SUPREME COURT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 308.

No. 76-5102. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 329.

No. 76-5104. ENDERS *v.* AMERICAN PATENT SEARCH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 1085.

No. 76-5122. ROMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-5133. BARBOSA *v.* WHITESIDE ET AL. C. A. 5th Cir. Certiorari denied.

No. 76-5136. COLLINS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 52 Mich. App. 332, 217 N. W. 2d 119.

No. 76-5139. CALISE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: — Cal. App. 3d —, — Cal. Rptr. —.

No. 76-5145. D'AGOSTINO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 76-5151. SCOTT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76-5204. HOSKINS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-5209. HAYES *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 351.

No. 76-5205. Collins *v.* Egeler, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 597.

No. 76-5214. Miera *v.* Aaron. C. A. 10th Cir. Certiorari denied.

No. 76-5215. Boyd *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 2d 1096, 384 N. Y. S. 2d 712.

No. 76-5217. Johnson *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 409, 527 F. 2d 1209.

No. 76-5218. Johnson *v.* Havener, Correctional Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 534 F. 2d 1232.

No. 76-5230. Boyer *v.* Boyer. Sup. Ct. Ohio. Certiorari denied. Reported below: 46 Ohio St. 2d 83, 346 N. E. 2d 286.

No. 76-5232. Browning *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 76-5243. Westberry *v.* Oliver, Warden, et al. C. A. 1st Cir. Certiorari denied. Reported below: 535 F. 2d 1333.

No. 76-5290. Thomas *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 332 So. 2d 168.

No. 76-5331. Epps *v.* Smith, Warden. C. A. 2d Cir. Certiorari denied.

No. 75-1420. Roundhouse Construction Corp. *v.* Telesco Masons Supplies Co. et al. Sup. Ct. Conn. Certiorari denied, it appearing that judgment below rests upon an adequate state ground. The Chief Justice, Mr. Justice White, and Mr. Justice Blackmun would grant certiorari. Reported below: 170 Conn. 155, 365 A. 2d 393.

No. 75-1354. TRANS WORLD AIRLINES, INC. *v.* DAY ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 528 F. 2d 31.

No. 75-1447. BERGER, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* AITCHISON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 538 F. 2d 307.

No. 76-101. DEMOCRATIC NATIONAL COMMITTEE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 76-205. CHISHOLM ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 176 U. S. App. D. C. 1, 538 F. 2d 349.

No. 76-470. SOCIALIST WORKERS PARTY ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Motion to expedite consideration with Nos. 76-101 and 76-205, immediately *supra*, granted. Certiorari denied.

No. 76-5080. MILLER *v.* SEARS, ROEBUCK & CO. ET AL. Sup. Ct. Okla. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 550 P. 2d 1330.

*Rehearing Denied*

No. 74-6065. SELMAN *v.* LOUISIANA, 428 U. S. 906;
No. 75-5844. ROBERTS *v.* LOUISIANA, 428 U. S. 325;
No. 75-6067. WATTS *v.* LOUISIANA, 428 U. S. 906; and
No. 75-6123. WASHINGTON *v.* LOUISIANA, 428 U. S. 906. Petition for rehearing denied.

OCTOBER 18, 1976

*Affirmed on Appeal*

No. 75-6429. THOMPSON *v.* HENSLEY, DISTRICT ATTORNEY, NINTH JUDICIAL DISTRICT OF NEW MEXICO, ET AL.

Appeal from D. C. N. M. Motion of appellant for leave to proceed *in forma pauperis* granted. Without indicating any views on the constitutionality of N. M. Stat. Ann. § 34-2-5 (1953), judgment affirmed insofar as it upholds the constitutionality of N. M. Stat. Ann. § 34-2-18 (1953).

*Appeals Dismissed*

No. 75-1638. KELL ET AL. *v.* CHILIVIS, REVENUE COMMISSIONER OF GEORGIA, ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 236 Ga. 226, 223 S. E. 2d 117.

No. 76-165. RESTAURANT INDUSTRIES CORP. ET AL. *v.* BYLICKI ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 336 So. 2d 107.

No. 76-281. HUB THEATRES, INC., ET AL. *v.* MASSACHUSETTS PORT AUTHORITY. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Mass. —, 346 N. E. 2d 371.

*Certiorari Granted—Vacated and Remanded.* (See also No. 75-1692, *ante*, p. 20.)

No. 75-1657. NORTH CAROLINA *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of Pub. L. 94-407, 82 Stat. 906. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 174 U. S. App. D. C. 475, 533 F. 2d 702.

*Miscellaneous Orders*

No. 67, Orig. IDAHO EX REL. ANDRUS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. Motion of Columbia River Fishermen's Protective Union for leave to file a brief as *amicus curiae* granted. [For earlier orders herein, see, *e. g.*, 425 U. S. 957.]

No. A-864 (O. T. 1975). HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* COOPERATIVE SERVICES, INC., ET AL. C. A. D. C. Cir. Motion to vacate or amend stay entered by THE CHIEF JUSTICE on April 15, 1976, denied.

No. A-218 (76-5094). PRITCHARD *v.* AULT, COMMISSIONER, DEPARTMENT OF OFFENDER REHABILITATION, ET AL. C. A. 5th Cir. Application for bail, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A-259. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT ET AL. *v.* UNDERWOOD ET AL. Application for stay of judgment of the United States District for the District of Columbia, entered June 8, 1976, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending further order of the Court. Reported below: 414 F. Supp. 526.

No. A-263. HANSON ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Application for preliminary injunction, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. 75-73. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 75-109. HUNERWADEL *v.* BAIRD ET AL., 428 U. S. 132. Motions to vacate order [in No. A-69] entered by MR. JUSTICE BRENNAN on July 30, 1976, denied.

No. 75-661. UNITED STATES *v.* ANTELOPE ET AL. C. A. 9th Cir. [Certiorari granted, 424 U. S. 907.] Motions of respondents for leave to proceed further herein *in forma pauperis* granted. Motions for appointment of counsel granted, and it is ordered that John W. Walker, Esquire, of Moscow, Idaho, serve as counsel for respondents Leonard Francis Davison and William Andrew Davison, and that

Allen V. Bowles, Esquire, of Moscow, Idaho, serve as counsel for respondent Antelope in this case.

No. 75–1397. JUIDICE ET AL., JUDGES *v.* VAIL ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 426 U. S. 946.] Motion of New York Consumer Protection Board for leave to file a brief as *amicus curiae* granted.

No. 76–156. VENDO CO. *v.* LEKTRO-VEND CORP. ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 815.] Motion of petitioner to accelerate briefing schedule and to advance oral argument denied.

No. 76–303. STAMATINOS *v.* MEHRTENS, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

*Probable Jurisdiction Noted*

No. 76–260. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* CUNNINGHAM ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 420 F. Supp. 1004.

*Certiorari Granted*

No. 76–15. CONTINENTAL T. V., INC., ET AL. *v.* GTE SYLVANIA, INC. C. A. 9th Cir. Certiorari granted. Reported below: 537 F. 2d 980.

No. 76–37. VORCHHEIMER *v.* SCHOOL DISTRICT OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 532 F. 2d 880.

No. 75–6909. MANESS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 512 F. 2d 88.

No. 75–6933. BROWN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion for leave to proceed *in forma pauperis* and certiorari granted.

*Certiorari Denied.* (See also No. 76–281, *supra.*)

No. 75–1799. Board of Education of Independent School District No. 53 of Oklahoma County *v.* Board of Education of Independent School District No. 52 of Oklahoma County et al. C. A. 10th Cir. Certiorari denied. Reported below: 532 F. 2d 730.

No. 75–1833. Meyers et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 1033.

No. 75–1862. Advocates for the Arts et al. *v.* Thomson, Governor of New Hampshire, et al. C. A. 1st Cir. Certiorari denied. Reported below: 532 F. 2d 792.

No. 75–1893. Tortorello *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 809.

No. 75–6675. Hawthorne *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 318.

No. 75–6800. Figueroa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 334.

No. 75–6805. Brown *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1248.

No. 75–6807. Williams *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 119.

No. 75–6867. Pryor *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 75–6931. Martin-Plascencia, aka Hernandez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1316.

No. 75–6969. Lee, aka Carter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 2d 1205.

No. 75-7012. KATZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 535 F. 2d 593.

No. 76-8. BAMFORD *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 250, 535 F. 2d 78.

No. 76-21. BERTUCCI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 1144.

No. 76-22. FRUCHTMAN *v.* KENTON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 2d 946.

No. 76-23. PATRIARCA *v.* TAYLOR ET AL. C. A. 1st Cir. Certiorari denied.

No. 76-25. DOULIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 466.

No. 76-27. NAPLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1255.

No. 76-51. GOODFRIEND WESTERN CORP., DBA WRANGLER WRANCH *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 535 F. 2d 145.

No. 76-55. CENTRAL BANK *v.* SMITH, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 37.

No. 76-87. WHITELEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 702, 538 F. 2d 346.

No. 76-88. POGUE, WARDEN *v.* AZBILL. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 195.

No. 76-123. DONKIN'S (A CALIFORNIA CORPORATION) *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 138.

No. 76–134. McMahon *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 241, 530 F. 2d 1093.

No. 76–137. Davis *v.* Hecht et al., Commissioners, Board of Elections of Dutchess County. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 51 App. Div. 2d 743, 379 N. Y. S. 2d 388.

No. 76–138. Goff *v.* Mathews, Secretary of Health, Education, and Welfare. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 309.

No. 76–163. Service Parts, Inc., et al. *v.* Saf-Gard Products, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1266.

No. 76–171. Smith et ux. *v.* Jaramillo, Director, Department of Alcohol Beverage Control of New Mexico. Sup. Ct. N. M. Certiorari denied.

No. 76–186. Restaurant Industries Corp. et al. *v.* Bylicki et al. Sup. Ct. Fla. Certiorari denied. Reported below: 336 So. 2d 107.

No. 76–207. Szima *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 70 N. J. 196, 358 A. 2d 773.

No. 76–226. Crateo, Inc. *v.* Intermark, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 862.

No. 76–241. Ocean Sands Holding Corp. *v.* Virginia Department of Taxation. Sup. Ct. Va. Certiorari denied.

No. 76–248. Hughes *v.* Dempsey-Tegeler & Co., Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 156.

No. 76–266. Griffin *v.* Zurz, Judge, et al. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1254.

No. 76-269. JENNINGS *v.* CADDO PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1331.

No. 76-285. O/Y FINNLINES, LTD., ET AL. *v.* BUTLER. C. A. 4th Cir. Certiorari denied. Reported below: 537 F. 2d 1205.

No. 76-295. HICKS ET AL. *v.* UNIROYAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 573.

No. 76-297. TURZILLO ET AL. *v.* P & Z MERGENTIME. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 318, 532 F. 2d 1393.

No. 76-298. STOLBERG *v.* MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 2d 890.

No. 76-305. PROGRESSIVE ENTERPRISES, INC. *v.* NEW ENGLAND MUTUAL LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 1057.

No. 76-313. GROSSMAN *v.* BERNARDS TOWNSHIP BOARD OF EDUCATION. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 319.

No. 76-5026. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 755.

No. 76-5034. DEVERSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 804.

No. 76-5042. SHATNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 76-5043. RIVERA DEGOMEZ *v.* KISSINGER, SECRETARY OF STATE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 518.

No. 75-5046. Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 580.

No. 76-5050. Theriault *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 281.

No. 76-5054. Torres-Rios *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 865.

No. 76-5069. Dove *v.* Secretary of Health, Education, and Welfare. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1254.

No. 76-5081. Sisk *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 343.

No. 76-5108. Haskins *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 775.

No. 76-5117. Wargo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5150. Jackson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5156. Harrison *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76-5223. Austin *v.* McMillan, U. S. District Judge. C. A. 4th Cir. Certiorari denied.

No. 76-5225. Kissel *v.* Labor and Industrial Relations Appeal Board et al. Sup. Ct. Hawaii. Certiorari denied. Reported below: 57 Haw. 37, 549 P. 2d 470.

No. 76-5235. Maggitt *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 533 F. 2d 383.

No. 76-5244. Watkins *v.* Gray, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 1258.

No. 76-5252. **Bynum** *v.* **Maryland.** Ct. App. Md. Certiorari denied. Reported below: 277 Md. 703, 357 A. 2d 339.

No. 76-5256. **Morgan** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 76-5264. **Pannell** *v.* **Maryland.** Ct. Sp. App. Md. Certiorari denied.

No. 76-5265. **Ralph** *v.* **Maryland.** Ct. Sp. App. Md. Certiorari denied.

No. 76-5271. **Jackson** *v.* **California.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5279. **McCrary** *v.* **New York.** App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 53 App. Div. 2d 587, 384 N. Y. S. 2d 1006.

No. 76-5286. **Stevens** *v.* **Washington.** Ct. App. Wash. Certiorari denied.

No. 76-5288. **Cook** *v.* **Florida.** Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 76-5293. **Durham** *v.* **Hopper, Warden.** C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 184.

No. 76-5294. **Clark** *v.* **City of Danville.** Sup. Ct. Ill. Certiorari denied. Reported below: 63 Ill. 2d 408, 348 N. E. 2d 844.

No. 76-5302. **White** *v.* **Wyrick, Warden.** C. A. 8th Cir. Certiorari denied.

No. 75-1737. **United States** *v.* **Portillo-Reyes.** C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. The Chief Justice and Mr. Justice Blackmun would grant certiorari. Reported below: 529 F. 2d 844.

No. 75-1719. Carlyle et al. *v.* United States;
No. 75-6636. Evans *v.* United States;
No. 75-6645. Nordstrom et al. *v.* United States;
No. 75-6741. Mize *v.* United States; and
No. 75-6985. Crouch *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of these petitions. Reported below: 528 F. 2d 625.

No. 75-1811. In re Allis. C. A. 9th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice Stewart would grant certiorari. Reported below: 531 F. 2d 1391.

No. 75-6494. Karen *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

At the beginning of his trial for manslaughter, petitioner, who acted as his own counsel throughout the trial, asked the judge to provide him with civilian clothes. He represented that he had been in jail for five years and had no suitable civilian clothing. Although there is some suggestion that petitioner might have been able to obtain suitable clothes,[1] the trial court did not reject his request for that reason.[2] Rather, it held that petitioner's appearance before the jury in clothes labeled "L. A. CO. JAIL" was "proper." Petitioner objected.

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[1] Brief for Respondent 27-28. Petitioner's mother was in the courtroom and other relatives resided in the community. Their presence cannot excuse the State from meeting its responsibility to petitioner, who was over 21 and had been a prisoner for five years. Cf. Administrative Office of the United States Courts, Guidelines for the Administration of the Criminal Justice Act, c. 2, p. 8 (1975) (determination of eligibility for appointed counsel to be made without reference to resources of defendant's family).

[2] The trial court also did not find, as the appellate court suggested, see Brief for Petitioner, Ex. A, pp. 31-32, that petitioner had available civilian clothes which he considered unsuitable.

Only five months ago, this Court unanimously recognized that an accused's appearance before a jury in identifiable jail clothes could deprive him of his fundamental right to a fair trial by undermining the presumption of innocence:

> "[T]he constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play." *Estelle* v. *Williams,* 425 U. S. 501, 504–505 (1976).

Under *Estelle,* the trial court's ruling that clean jail clothes are "proper" attire for trial is clearly wrong.

That petitioner asked that the State supply him with clothes, rather than that he be allowed to wear clothes of his own, cannot justify the trial court's ruling. In a system aspiring toward the ideal of equal justice under law, indigence cannot be allowed to deprive an accused of that presumption of innocence which " 'lies at the foundation of the administration of our criminal law.' " *Id.,* at 503, quoting *Coffin* v. *United States,* 156 U. S. 432, 453 (1895). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois,* 351 U. S. 12, 19 (1956).

The California Court of Appeal correctly assumed that the trial court's ruling was erroneous. It held, however, that the error was "harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U. S. 18, 24 (1967). In essence, the appellate court reasoned that petitioner was not harmed by his appearance in jail clothing because he was also deprived of the presumption of innocence by other actions taken by the trial court. Specifically, the Court of Appeal recognized that the California procedure of permitting a manslaughter defendant[3] to be tried on an information alleging murder, allowing the prosecutor to argue to the jury that a murder was committed, and instructing the jury on the elements of first- and second-degree murder, inevitably taints the defendant in the eyes of the jury. The appellate court felt constrained to approve this procedure because of California Supreme Court precedent:[4]

> "By following the California Supreme Court mandate and permitting defendant to be tried on an information alleging murder, by receiving evidence of murder, and by its instructions to the jury, the trial court informed it that this was not the run-of-the-mill defendant. The damage done by defendant's appearance in jail clothing was accomplished by a procedure held valid by our Supreme Court. Any error in denying defendant's motion for civilian clothing thus did not further prejudice him."

This reasoning transforms the harmless-error rule of *Chapman* into the legal equivalent of the doctrine that two wrongs make a right.

This Court has never passed on the prejudicial and unnecessary[5] procedure that the appellate court thought rendered

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[3] Petitioner's first trial for murder resulted in a conviction of second-degree murder. That conviction was reversed on appeal. His second trial resulted in a voluntary manslaughter conviction, which was also reversed. His third trial ended with another voluntary manslaughter conviction. The appellate court reduced that conviction to involuntary manslaughter because of an error in jury instructions. The judgment of guilty of involuntary manslaughter is before us on the present petition.

[4] See *People* v. *McFarlane*, 138 Cal. 481, 71 P. 568 (1903), cited in *In re McCartney*, 64 Cal. 2d 830, 415 P. 2d 782 (1966). *McCartney* relied on *McFarlane* for the proposition that a defendant whose manslaughter conviction on a murder information had been reversed could be retried for manslaughter despite the running of the statute of limitations for that crime.

[5] The California Court of Appeal noted:

"The result sought by the awkward approach is obtainable without the

the error here harmless. But in *Price* v. *Georgia,* 398 U. S. 323 (1970), we did reject a harmlessness claim in a case almost identical to petitioner's. In *Price,* the defendant's first trial had ended in an acquittal on a murder charge and a conviction on a manslaughter charge; the conviction was reversed on appeal. The defendant then was retried on the murder charge and again convicted only of manslaughter. The State argued that any error in retrying the defendant for murder was harmless in light of the fact that he was acquitted of the murder charge at the second trial. That argument was rejected, in part because the defendant had improperly been made to suffer the trauma and risk of a second murder trial. But the Court considered "perhaps of more importance" the fact that it could not "determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex rel. Hetenyi* v. *Wilkins,* 348 F. 2d 844 (CA2 1965), cert. denied, 383 U. S. 913 (1966)." *Id.,* at 331–332. Although there is no possibility here that the jury compromised on the manslaughter conviction since it was instructed that it could return no verdict higher than manslaughter, a similar flaw inheres in the California procedure. It is simply impossible to say that submitting to the jury a heinous crime for which petitioner was not on trial and of which he could not have been convicted might not have "induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence."

I would grant the writ of certiorari.

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confusion and prejudice flowing from it. Where there is a reversed conviction of an offense included in a greater charge, the information can be amended accordingly and the jury instructed that for the purposes of the particular case the lesser offense is defined to include the ultimate facts which constitute the definition of the greater crime originally alleged."

No. 75-6839. Hebert *v.* Southern Pacific Transportation Co. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 936.

Mr. Justice Blackmun, with whom Mr. Justice Brennan joins, dissenting.

Petitioner Hebert instituted this suit under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51-60. He allegedly sustained disabling injuries in a fall while at work in 1969. Respondent-defendant Southern Pacific Transportation Company, a common carrier by rail, filed a motion for summary judgment on the ground that Hebert was not "employed by such carrier," within the liability-imposing language of § 51. The District Court, relying specifically on *Kelley* v. *Southern Pacific Co.*, 486 F. 2d 1084 (CA9 1973), and despite the then-outstanding grant of certiorari in that case by this Court, 416 U. S. 935 (1974), sustained the motion. It held that at the time of his injury petitioner Hebert was an employee of Southern Pacific Transport Company, a trucking company wholly owned by the respondent railroad, and was not an employee of the respondent, and that *Kelley* "appears to be on all fours" with Hebert's case.

*Kelley*, however, as decided by the Ninth Circuit and as so relied on by the District Court, did not survive unscathed. This Court thereafter vacated the judgment of the Ninth Circuit and sent the case back "with instructions to remand the case to the District Court for further findings in accordance with this opinion." 419 U. S. 318, 332 (1974). Although I dissented from the Court's opinion, *id.*, at 341, as did Mr. Justice Douglas and Mr. Justice Brennan, *id.*, at 333,[1] the Court in *Kelley* appears to have set forth standards for the trier of fact to apply in determining whether an injured plaintiff, although technically employed by the carrier's wholly owned trucking company, is nevertheless entitled to coverage under the FELA. The Court concluded that the District Court in Kelley's case had applied erroneous standards and that the Court of Appeals should have remanded and not reversed. As I read the Court's opinion, it determined that what was dispositive in a situation of this kind was whether a master-servant relationship existed between the defendant railroad and the claimant, *id.*, at 323, and that the resolution of this issue ultimately depended on the employer's control or right to control the conduct of the claimant-employee. The Court, in elaboration, set forth three methods by which employment for FELA purposes could be established.[2]

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[1] Mr. Justice Stewart concurred in the judgment. 419 U. S., at 332.

The interesting and significant fact is that upon the remand to the District Court claimant Kelley *prevailed* under the subservant theory approved by this Court. The trial court found that the unloading operation "was the responsibility" of the railroad; that the carrier "supplied the necessary ramps and working area"; that its employees were required to check safety aspects daily and "to make all necessary repairs"; that the railroad "had the right to control the physical conduct of the [trucking company's] employees"; that the trucking company "was acting as the servant" of the carrier "when performing the unloading operations"; and that Kelley "was in fact a subservant of a servant" of the carrier when he was injured. The trial court then concluded that Kelley was covered by the FELA. See File No. C-45344 AJZ (ND Cal.), order entered Sept. 3, 1975.[3]

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[2] "First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. . . . Second, he could be deemed to be acting for two masters simultaneously. . . . Finally, he could be a subservant of a company that was in turn a servant of the railroad." *Id.*, at 324.

[3] The District Court's decision was appealed to the United States Court of Appeals for the Ninth Circuit, but the appeal was later dismissed pursuant to Fed. Rule App. Proc. 42 (b). *Kelley* v. *Southern Pacific Co.*, No. 75-3818, order entered Aug. 18, 1976. This voluntary dismissal means,

In petitioner Hebert's case, the District Court made its findings *prior* to this Court's *Kelley* decision and, in so doing, regarded as "[d]irectly on point" and as "on all fours" the very ruling of the Court of Appeals in *Kelley* that thereafter was vacated by this Court. And on that remand the injured claimant has prevailed.

It is true, of course, that the Court of Appeals (but not the District Court) in the present case had before it the precedent of this Court's decision in *Kelley*. It said that this Court "approved the approach of the Ninth Circuit," rather than the "more liberal approach taken by the Fourth Circuit in *Smith* v. *Norfolk & W. Ry.*, 407 F. 2d 501 (4th Cir.), cert. denied, 395 U. S. 979," and that "there is no necessity for a remand" because the trial court "accurately forecast the law and correctly applied the now-affirmed standard to the undisputed facts of this case." 526 F. 2d 936, 937 (CA5 1976). I read the District Court's findings, however, as directly focused on the technical employment of Hebert by the trucking company. But that technical employment proved not to be sufficient and dispositive in *Kelley*.

I cannot equate a trial court's flat reliance on a Court of Appeals opinion subsequently discredited by this Court as an end to the matter. It seems to me that Hebert, like Kelley, is entitled to have the trial court consider his employment relationship to the respondent carrier in the light of the standards enunciated by this Court in its subsequent *Kelley* decision, untainted by other standards that it thought were controlling and that were thereafter held to be incorrect. To deny Hebert what Kelley received is to do him a judicial injustice. It may be that on remand Hebert would not prevail. In my view, however, he is entitled to the opportunity to make his case.

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of course, that Kelley finally recovered under the criteria set out in this Court's opinion.

I, therefore, dissent from the denial of certiorari. I would grant the petition, vacate the judgment, and remand the case to the United States Court of Appeals for the Fifth Circuit, with directions to remand to the United States District Court for the Eastern District of Louisiana for reconsideration in light of the intervening decision in *Kelley* v. *Southern Pacific Co.,* 419 U. S. 318 (1974).

No. 75-6894. SCHUER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 532 F. 2d 756.

No. 76-145. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO ET AL. *v.* REID BURTON CONSTRUCTION, INC. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 535 F. 2d 598.

No. 76-191. ANSCHUL *v.* SITMAR CRUISES, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL would grant certiorari. Reported below: 544 F. 2d 1364.

No. 76-5044. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Motion of Michael Olmo for leave to join in petition and certiorari denied. Reported below: 536 F. 2d 886.

No. 76-5114. IN RE K, A MINOR, BY ATCHLEY. Sup. Ct. Tex. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 535 S. W. 2d 168.

No. 76-5175. C. *v.* F. ET AL. Ct. App. Ore. Motion of Child Advocacy Project et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 24 Ore. App. 601, 547 P. 2d 175.

*Assignment Orders*

Orders of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit for the periods April 11 to April 15, 1977; May 9, 10, 12, and 13, 1977; and June 13 to June 15, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), are ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

### OCTOBER 29, 1976

*Miscellaneous Order*

No. A-342. MCCARTHY ET AL. *v.* CONTESSA ET AL., NEW YORK STATE BOARD OF ELECTIONS. Application for stay of judgment of the Court of Appeals of New York, dated October 28, 1976, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

### NOVEMBER 1, 1976

*Affirmed on Appeal*

No. 76-287. HOWELL ET AL. *v.* DEBUSK ET AL. Affirmed on appeal from D. C. N. D. Tex.

*Appeals Dismissed*

No. 75-1886. TEXAS EX REL. VOGTSBERGER *v.* CITY OF WICHITA FALLS. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 533 S. W. 2d 927.

No. 76-67. PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON *v.* MADDEN ET UX. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 538 F. 2d 338.

No. 76–5343. **Ridley** *v.* **Virginia.** Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–338. **Ballentine et al.** *v.* **Willingham et al.** Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 237 Ga. 60, 226 S. E. 2d 593.

No. 76–5029. **Hamilton** *v.* **Florida.** Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 329 So. 2d 283.

No. 76–5301. **Silver** *v.* **Larson Ford Sales, Inc.** Appeal from Sup. Ct. Utah dismissed for want of substantial federal question. Reported below: 551 P. 2d 233.

*Certiorari Granted—Vacated and Remanded*

No. 75–1883. **United States** *v.* **Jacobs, aka Kramer.** C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mandujano,* 425 U. S. 564 (1976). Reported below: 531 F. 2d 87.

Mr. Justice Stevens, concurring.

My original reaction to the proposal to vacate and remand in the light of *United States* v. *Mandujano,* 425 U. S. 564, was exactly that expressed by Mr. Justice Marshall in dissent. For as a Circuit Judge I had the experience of trying to decipher similar Delphic orders, and I agree completely that a constitutional holding is not controlling on a question involving nothing more than an exercise of an appellate court's supervisory power. Nevertheless, there is an omission in the Court of Appeals opinion which makes it appropriate for that court to re-examine its holding.

As the concurring opinions by Mr. Justice Brennan and Mr. Justice Stewart in *Mandujano* demonstrate, the fact that the prosecutor may have erred in failing to give a grand jury witness adequate warnings does not lead inexorably to the conclusion that the witness cannot be prosecuted for perjury. Cf. *United States* v. *Knox,* 396 U. S. 77, 82. The Court of Appeals opinion seems to assume that the conclusion necessarily follows from the premise. Since I think it would be appropriate for that court to address that precise point in the first instance, I acquiesce in the remand.

MR. JUSTICE STEWART, dissenting.

As MR. JUSTICE MARSHALL explains, this order of the Court is little short of irrational. While our heavy caseload necessarily leads us sometimes to dispose of cases summarily, it must never lead us to dispose of any case irresponsibly. Yet I fear precisely that has happened here.

The Court of Appeals to which this case is now remanded cannot but find this order totally incomprehensible.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

"In the interest of uniformity in criminal procedure within the circuit," the Court of Appeals affirmed the District Court's decision to suppress respondent's grand jury testimony.* The Court of Appeals explicitly disclaimed a constitutional basis for its holding. Its action was taken "pursuant to [its] supervisory function." 531 F. 2d 87, 90 (1976).

There is no reason to expect the Court of Appeals to reach a different result in light of our decision in *United States* v. *Mandujano,* 425 U. S. 564 (1976). Our holding that respondent would not have had a constitutional right to have her testimony suppressed simply has no bearing on a lower court decision which did not assume the existence of such a constitutional right. And it is clear that the well-established supervisory power of the courts of appeals over the district courts in their respective jurisdictions is not limited to enforcing constitutional rights. See, *e. g., Cupp* v. *Naughten,* 414 U. S. 141, 146 (1973); *Barker* v. *Wingo,* 407 U. S. 514, 530 n. 29 (1972); *United States* v. *Thomas,* 146 U. S. App. D. C. 101, 109–111, 449 F. 2d 1177, 1185–1187 (1971) (en banc); cf., *e. g., Ristaino* v. *Ross,* 424 U. S. 589, 597 n. 9 (1976); *Murphy* v. *Florida,* 421 U. S. 794, 797–798 (1975); *id.,* at 804 (BURGER, C. J., concurring).

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*The Court of Appeals determined that it is the universal practice of United States Attorneys in the Second Circuit to warn a grand jury witness who is the target of an investigation. Respondent was called before the grand jury by a Strike Force attorney operating in the Eastern District of New York but based in Washington. She received no warning.

Accepting the Government's suggestion that we vacate and remand so that the Court of Appeals can reconsider its decision in light of an irrelevant case is a waste of the time of two courts. I respectfully dissent.

No. 76–126. CHASE MANHATTAN BANK *v.* SAILBOAT APARTMENT CORP. ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari granted, judgment vacated, and case remanded for a determination of whether petitioner has waived protection of the venue provision of the National Bank Act, 12 U. S. C. § 94. See *National Bank* v. *Associates of Obstetrics,* 425 U. S. 460 (1976). Reported below: 334 So. 2d 604.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's action in this case is not supported by the precedent on which it relies. In *National Bank* v. *Associates of Obstetrics,* 425 U. S. 460, the Utah Supreme Court erroneously held that 12 U. S. C. § 94 was "permissive and not exclusive." We remanded because that court had not reached the waiver issue in its previous opinion. In the present case, however, the state courts have given no explanation for their rejection of petitioner's venue claim. A remand in this case can only rest on the unwarranted assumption that the state courts relied on some ground other than waiver. The presumption, however, should be that the state courts recognized and relied on the strongest argument in favor of their holding—in this case, the waiver argument.*

I am therefore unable to concur in the Court's summary action in this case. Since this case is unworthy of plenary review, I would deny certiorari.

No. 76-5006. McCall *v.* North Carolina; and

No. 76-5208. McKenna *v.* North Carolina. Sup. Ct. N. C. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalty imposed, and cases remanded for further proceedings. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Reported below: No. 76-5006, 289 N. C. 512, 223 S. E. 2d 303; No. 76-5208, 289 N. C. 668, 224 S. E. 2d 537.

*Certiorari Granted—Reversed.* (See No. 75-1666, *ante*, p. 24.)

*Certiorari Granted—Reversed and Remanded.* (See No. 75-1726, *ante*, p. 28.)

*Miscellaneous Orders*

No. A-301. Enomoto, Corrections Director, et al. *v.* Wright et al. Application for stay of execution and enforcement of judgment of the United States District Court for the Northern District of California, entered September 30, 1976, presented to Mr. Justice Rehnquist, and by him referred to the Court, granted.

No. A-306. Board of Curators of the University of Missouri et al. *v.* Horowitz. Application for stay of man-

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*The waiver argument is based on the conduct of petitioner's alleged corporate alter ego. Apparently the Court finds some possible merit in this argument; otherwise, it would simply reject the argument summarily as it did the "local action" argument in *National Bank*, 425 U. S., at 461 n.

date of the United States Court of Appeals for the Eighth Circuit, entered September 9, 1976, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted pending timely filing and disposition of petition for writ of certiorari.

No. D-60. IN RE DISBARMENT OF HOFFER. It is ordered that Harry Hoffer, of Merrick, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-61. IN RE DISBARMENT OF HEMLOCK. It is ordered that Alfred J. Hemlock, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-62. IN RE DISBARMENT OF PERSKY. It is ordered that Robert S. Persky, of New York, N. Y., be suspended from the pratice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-63. IN RE DISBARMENT OF SMILEY. It is ordered that Morton H. Smiley, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-64. IN RE DISBARMENT OF WASSERMAN. It is ordered that Jack Seymour Wasserman, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–65. In re Disbarment of Gallant. It is ordered that Samuel Gallant, of Westport, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–66. In re Disbarment of Seffern. It is ordered that John J. Seffern, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–67. In re Disbarment of Meyer. It is ordered that Allen A. Meyer, Jr., of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 71–6625. Holt *v.* City of Richmond et al., 408 U. S. 931. Motion to dissolve injunction granted by this Court on April 24, 1972 [406 U. S. 903], granted. Mr. Justice Powell took no part in the consideration or decision of this motion.

No. 75–503. Cook et al. *v.* Hudson et al. C. A. 5th Cir. [Certiorari granted, 424 U. S. 941.] Motion of National Education Assn. to reconsider order [*ante*, p. 810] denying leave to file brief as *amicus curiae* granted, and it is now ordered that motion for leave to file be granted and brief filed.

No. 75–651. Teamsters Local Union 657 *v.* Rodriguez et al.; Teamsters Local Union 657 *v.* Herrera et al.; and Teamsters Local Union 657 *v.* Resendis et al.; and

No. 75–715. Southern Conference of Teamsters *v.* Rodriguez et al.; Southern Conference of Teamsters *v.* Herrera et al.; and Southern Conference of Teamsters *v.* Resendis et al. [Certiorari granted, 425 U. S. 990.] Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted.

No. 75–811. Superior Court of the District of Columbia et al. *v.* Palmore et al.; and Swain, Reformatory Superintendent *v.* Pressley. C. A. D. C. Cir. [Certiorari granted, 424 U. S. 907.] Motion of the Solicitor General to vacate and remand judgment in *Superior Court of the District of Columbia* v. *Palmore* granted and cause remanded for further consideration in light of *Stone* v. *Powell,* 428 U. S. 465 (1976). Remainder of case shall remain on docket of this Court and is now captioned *Swain, Reformatory Superintendent* v. *Pressley.*

No. 75–1153. Abood et al. *v.* Detroit Board of Education et al. Appeal from Ct. App. Mich. [Probable jurisdiction noted, 425 U. S. 949.] Motion of American Federation of Labor & Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* denied.

No. 75–1262. United States et al. *v.* County of Fresno; and United States et al. *v.* County of Tuolumne. Appeal from Ct. App. Cal., 5th App. Dist. [Probable jurisdiction noted, 425 U. S. 970.] Motion of appellees for divided argument granted.

No. 75–1264. International Union of Electrical Radio & Machine Workers, AFL–CIO, Local 790 *v.* Robbins & Myers, Inc., et al.; and

No. 75–1276. Guy *v.* Robbins & Myers, Inc., et al. C. A. 6th Cir. [Certiorari granted, 425 U. S. 950.] Motion of petitioners for divided argument granted.

No. 75–1397. Juidice et al., Judges *v.* Vail et al. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 426 U. S. 946.] Motion of New York State Consumer Protection Board for leave to present oral argument as *amicus curiae* denied.

No. 76–229. Alphin et al *v.* Henson et al. C. A. 4th Cir. Motion to defer consideration granted.

No. 75–1407. TRAINOR, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL. *v.* HERNANDEZ ET UX. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 426 U. S. 918.] Motion of State's Attorney for Cook County for divided argument granted.

No. 75–1413. STANTON, ADMINISTRATOR, INDIANA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* BOND ET AL. C. A. 7th Cir. [Certiorari granted, 426 U. S. 905.] Motion of the State of Illinois for leave to file an untimely brief as *amicus curiae* denied.

No. 75–1439. SMITH *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 426 U. S. 946.] Motion of Citizens for Decency Through Law, Inc., for leave to file a brief as *amicus curiae* granted.

No. 75–1510. WEATHERFORD, AGENT OF THE SOUTH CAROLINA ENFORCEMENT DIVISION, ET AL. *v.* BURSEY. C. A. 4th Cir. [Certiorari granted, 426 U. S. 946.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Respondent granted 15 additional minutes for oral argument.

No. 75–1805. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante,* p. 815.] Motion of petitioner for appointment of counsel granted, and it is ordered that Stephan Bower, Esquire, of Kentland, Ind., is appointed to serve as counsel for petitioner in this case.

No. 76–167. UNITED STATES *v.* RAMSEY ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 815.] Motion of respondent James W. Kelly for appointment of counsel granted, and it is ordered that Irving R. M. Panzer, Esquire, of Washington, D. C., is appointed to serve as counsel for respondent James W. Kelly in this case.

No. 75–1404. Do-Right Auto Sales et al. *v.* United States Court of Appeals for the Seventh Circuit et al. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 76–257. Ratcliff *v.* United States District Court for the Southern District of Texas. Motion for leave to file petition for writ of mandamus denied.

No. 76–348. Jenneman et ux. *v.* Dawson et al., Judges. Motion for leave to file petition for writ of prohibition denied.

*Probable Jurisdiction Noted*

No. 76–208. Nyquist, Commissioner of Education of New York, et al. *v.* Mauclet et al. Appeal from D. C. W. D. and D. C. E. D. N. Y. Probable jurisdiction noted. Reported below: 406 F. Supp. 1233.

*Certiorari Granted*

No. 76–120. United States *v.* Martin Linen Supply Co. et al. C. A. 5th Cir. Certiorari granted. Reported below: 534 F. 2d 585.

No. 76–333. United Air Lines, Inc. *v.* Evans. C. A. 7th Cir. Certiorari granted. Reported below: 534 F. 2d 1247.

No. 76–5382. Darden *v.* Florida. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 329 So. 2d 287.

*Certiorari Denied.* (See also Nos. 75–1886, 76–67, and 76–5343, *supra.*)

No. 75–1280. Barket *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 530 F. 2d 181.

No. 75–1623. Brown *v.* Lundgren, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 1050.

No. 75–1761. Hilton *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75-1766. Fleishman *v.* McFee et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-1808. Calvo *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 313 So. 2d 39.

No. 75-1831. Robinson et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 574.

No. 75-1905. Mullenax *v.* United States; and

No. 75-1910. Ford *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 314.

No. 75-1916. Ballard *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 2d 400.

No. 75-6747. Frankos *v.* LaVallee, Correctional Superintendent, et al. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1346.

No. 75-6815. Brown *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 326 So. 2d 839.

No. 75-6829. Bradley *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 315.

No. 75-6870. Bradley *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 137 Ga. App. 670, 224 S. E. 2d 778.

No. 75-6892. Delaney *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 75-6902. Bowen *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-6923. Morris *v.* Superior Court of California, County of Los Angeles. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-6932. Zeidman *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 1257.

No. 75-6954. Scrivens *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1263.

No. 75-6967. Holsey *v.* Watkins, U. S. District Judge, et al. C. A. 4th Cir. Certiorari denied.

No. 75-6976. Lowery *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 750.

No. 75-6980. Davis et al. *v.* Director, Patuxent Institution. Ct. Spec. App. Md. Certiorari denied. Reported below: 29 Md. App. 705, 351 A. 2d 905.

No. 75-6987. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 343.

No. 75-7004. Braddy et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 573.

No. 75-7006. Eskew *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 335.

No. 76-1. Taylor *v.* United States; and
No. 76-11. Hall *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 536 F. 2d 313.

No. 76-2. Griffin et al. *v.* United States. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 537 F. 2d 1130.

No. 76-30. Diaco et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 76-31. Eisner *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 2d 987.

No. 76-35. Chew et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 334.

No. 76-43. City of Philadelphia et al. *v.* Rumsfeld, Secretary of Defense, et al. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 2d 1245.

No. 76-44. McMurtrey *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 1321.

No. 76-46. American Tobacco Co. et al. *v.* Patterson et al.; and

No. 76-56. Tobacco Workers' International Union et al. *v.* Patterson et al. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 257.

No. 76-52. Arteaga-Limones *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1183.

No. 76-53. LaRue et ux. *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 336.

No. 76-74. Fales *v.* Mathews, Secretary of Health, Education, and Welfare. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 525.

No. 76-79. Wolf *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 2d 476.

No. 76-89. Napoli *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1198.

No. 76-118. House *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 76-140. Kent Corp. *v.* National Labor Relations Board et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 612.

No. 76-154. Book et al. *v.* National Labor Relations Board et al. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 877.

No. 76-181. Biderman et al. *v.* Hills, Secretary of Housing and Urban Development. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 820.

No. 76-199. Olk *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 876.

No. 76-209. **Common Carrier Conference-Irregular Route et al.** *v.* **United States et al.** C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 244, 534 F. 2d 981.

No. 76-210. **Spivey** *v.* **Georgia.** Ct. App. Ga. Certiorari denied. Reported below: 138 Ga. App. 298, 226 S. E. 2d 104.

No. 76-217. **Stone et ux.** *v.* **United States et al.** C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 314.

No. 76-222. **Estate of Thalheimer et al.** *v.* **Commissioner of Internal Revenue.** C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 751.

No. 76-227. **Pacific FM, Inc., dba Radio Station K-101** *v.* **National Labor Relations Board.** C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 337.

No. 76-251. **Sudler, now DuFresne** *v.* **Sudler.** App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 35 Ill. App. 3d 917, 342 N. E. 2d 772.

No. 76-253. **Bergh** *v.* **Washington et al.** C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 505.

No. 76-262. **Goldstein** *v.* **California.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-275. **Band-Age, Inc.** *v.* **National Labor Relations Board.** C. A. 1st Cir. Certiorari denied. Reported below: 539 F. 2d 701.

No. 76-277. **Daley** *v.* **Rose Aviation, Inc.** C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 333.

No. 76-280. **Forster et al.** *v.* **United States.** Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 733, 538 F. 2d 347.

No. 76-299. Saalfrank *v.* Parkview Memorial Hospital, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 2d 325.

No. 76-300. Garger et al. *v.* New Jersey et al. Sup. Ct. N. J. Certiorari denied. Reported below: 70 N. J. 10, 355 A. 2d 647.

No. 76-311. Louisiana Bank & Trust Company of Crowley, Louisiana *v.* Employers Liability Assurance Corp., Ltd. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 290.

No. 76-322. Gene Slagle, Inc., et al. *v.* General Telephone Company of Ohio et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 46 Ohio St. 2d 124, 346 N. E. 2d 790.

No. 76-324. Steinman *v.* Nadjari et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dist. Certiorari denied. Reported below: 49 App. Div. 2d 456, 375 N. Y. S. 2d 622.

No. 76-340. Van de Kamp, District Attorney of Los Angeles County, et al. *v.* Projection Room Theater et al. Sup. Ct. Cal. Certiorari denied. Reported below: 17 Cal. 3d 42, 550 P. 2d 600.

No. 76-341. California Department of Water Resources *v.* Oroville-Wyandotte Irrigation District. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 304.

No. 76-350. Atlantic Improvement Corp. *v.* City of New York. Ct. App. N. Y. Certiorari denied. Reported below: 39 N. Y. 2d 905, 352 N. E. 2d 587.

No. 76-360. Friedlander *v.* Kentucky Bar Assn. Sup. Ct. Ky. Certiorari denied. Reported below: 536 S. W. 2d 454.

No. 76-362. Quarles *v.* Quarles. Ct. App. D. C. Certiorari denied. Reported below: 353 A. 2d 285.

No. 76-364. WOODRUFF ET AL. *v.* AIR PROPERTIES G., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 279.

No. 76-393. O'CONNOR *v.* STATE TAX COMMISSION OF NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 76-5001. MIYAKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 342.

No. 76-5005. BUNN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 2d 1077.

No. 76-5008. GRIFFIN *v.* UNITED STATES; and
No. 76-5128. MONTANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 336.

No. 76-5014. ARMENTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1374.

No. 76-5025. KIMMONS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 322 So. 2d 36.

No. 76-5031. GONZALEZ-BENITEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 537 F. 2d 1051.

No. 76-5051. MAHAR *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 137 Ga. App. 116, 223 S. E. 2d 204.

No. 76-5055. WEATHERALL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 73 Wis. 2d 22, 242 N. W. 2d 220.

No. 76-5056. PAYDEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 541.

No. 76-5063. HURT *v.* LORTON COMPLEX ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76-5065. Newman *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 342.

No. 76-5072. Pollack *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 227, 534 F. 2d 964.

No. 76-5075. Flint *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 58.

No. 76-5076. Garza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 309.

No. 76-5083. Phillips *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 533 F. 2d 369.

No. 76-5088. Marshall *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 410.

No. 76-5091. Wright *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 537 F. 2d 1144.

No. 76-5093. Martinez *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 1330.

No. 76-5095. Alvarez *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 536 S. W. 2d 357.

No. 76-5096. Olsen *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 993.

No. 76-5097. Owens *v.* Sigler, Chairman, U. S. Board of Parole, et al. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-5100. Harris *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1405.

No. 76-5106. Rini *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 236 Ga. 715, 225 S. E. 2d 234.

No. 76-5107. COLLIER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 76-5112. REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 76-5113. HAILEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76-5115. RAINES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 796.

No. 76-5120. BENNETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 539 F. 2d 45.

No. 76-5121. HERRON *v.* UNITED STATES; and

No. 76-5124. TOBIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 76-5126. GRAHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 261.

No. 76-5138. KARNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76-5142. BARRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1374.

No. 76-5158. DANIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76-5161. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 76-5163. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 544.

No. 76-5169. NORMAN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 76-5170. Lambrecht *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5171. Casimiro-Benitez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 1121.

No. 76-5180. Spencer *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 76-5191. Harper *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 1134.

No. 76-5197. Williams *v.* District of Columbia Board of Appeals and Review. Ct. App. D. C. Certiorari denied.

No. 76-5198. Crespo-Guerrero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5201. Goodman *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1373.

No. 76-5202. Gutierrez-Gutierrez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5219. Hubbard *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 76-5246. Houston *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 2d 758, 382 N. Y. S. 2d 213.

No. 76-5247. Soto *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5270. Santos-Figueroa *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 198.

No. 76-5274. Jokinen *v.* Henwood et al. C. A. 6th Cir. Certiorari denied.

No. 76-5285. Martini *v.* Republic Steel Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 2d 1079.

No. 76-5298. Welton *v.* Norenberg. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied.

No. 76-5303. Watson *v.* Warden, Virginia State Penitentiary. Sup. Ct. Va. Certiorari denied.

No. 76-5314. Lee *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 184.

No. 76-5318. Dioquino *v.* Workmen's Compensation Appeal Board of California et al. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 61 Cal. App. 3d 254, 132 Cal. Rptr. 505.

No. 76-5323. Mattingly *v.* Industrial Commission of Illinois et al. Sup. Ct. Ill. Certiorari denied. Reported below: 62 Ill. 2d 504, 343 N. E. 2d 449.

No. 76-5335. Rich *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5337. Stathas *v.* Cox et al. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 711.

No. 76-5342. Bates *v.* Litchfield Independent Review et al. Dist. Ct. Minn., 8th Jud. Dist. Certiorari denied.

No. 76-5345. Kinsley *v.* Mallar, Chairman, State Board of Workmen's Compensation, et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 974.

No. 76-5346. Chesson *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 216 Va. 827, 223 S. E. 2d 923.

No. 76-5353. Melnyczenko *v.* Hewitt, Correctional Superintendent. C. A. 3d Cir. Certiorari denied.

No. 76-5363. JENNINGS *v.* DILLARD ET AL. C. A. 7th Cir. Certiorari denied.

No. 76-5365. SENSABAUGH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1405.

No. 76-5366. DEBOES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5371. STEFANICK *v.* PLANTE ET AL. C. A. 8th Cir. Certiorari denied.

No. 76-5374. CARTER *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied.

No. 76-5376. ALERS *v.* TOLEDO ET AL. C. A. 1st Cir. Certiorari denied.

No. 76-5384. MENA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 138 Ga. App. 722, 227 S. E. 2d 411.

No. 76-5385. POWELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 538 S. W. 2d 617.

No. 76-5426. CANNON ET AL. *v.* JOHNSON, EXECUTIVE DIRECTOR, BOARD OF PROBATION AND PAROLE. C. A. 3d Cir. Certiorari denied. Reported below: 536 F. 2d 1013.

No. 76-5432. CRUTCHFIELD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 553 P. 2d 504.

No. 75-1600. THEVIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 989.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted of mailing obscene materials in violation of 18 U. S. C. § 1461. I adhere to the view that this statute is "'clearly overbroad and unconstitutional on its face.'" See, *e. g., Millican* v. *United States,* 418 U. S. 947, 948 (1974) (BRENNAN, J., dissenting from denial of certiorari), quoting *United States* v. *Orito*, 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would grant certiorari and reverse.

No. 75–1826. AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL *v.* EVANS. Sup. Ct. Ga. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 236 Ga. 661, 225 S. E. 2d 34.

No. 75–1842. CALIFORNIA *v.* RAMEY. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 16 Cal. 3d 263, 545 P. 2d 1333.

No. 75–1918. SALERNO *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to strike memorandum for the United States and certiorari denied. Reported below: 532 F. 2d 185.

No. 75–6895. DOLEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari.

No. 76–112. WEYERHAEUSER CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 538 F. 2d 1363.

No. 76–5332. RICE *v.* GENUNG'S, INC. App. Sess., Super. Ct. Conn. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari.

No. 76–185. CONFEDERATED SALISH AND KOOTENAI TRIBES OF FLATHEAD INDIAN RESERVATION ET AL. *v.* NAMEN ET AL. C. A. 9th Cir. Motions of Montana Inter-Tribal Policy Board and Lummi Indian Tribe et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 534 F. 2d 1376.

No. 76–204. FEINBERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 535 F. 2d 1004.

No. 76-221. NATHAN *v.* UNITED STATES. C. A. 2d Cir. Motion to vacate and remand and certiorari denied. Reported below: 536 F. 2d 988.

No. 76-270. HAKIM *v.* COMMISSIONER OF INTERNAL REVENUE. Petition for certiorari and other relief before judgment to C. A. 6th Cir. denied.

No. 76-293. TAYLOR *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted after a jury trial in Sullivan County Criminal Court, Tenn., of exhibiting two allegedly obscene motion pictures in violation of Tenn. Code Ann. § 39-3013 (A) (1975), which provides in pertinent part:

> "It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter."

As used in that section,

> "(A) 'Obscene' means (1) that the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes, in a patently offensive way, sexual conduct; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> "(C) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture film, or other pictorial representation, or any statue, figure, device, theatrical production or live performance, or any recording, tran-

> scription, or mechanical, chemical or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by §§ 39-3010—39-3022.
>
> "(E) 'Distribute' as used above means to transfer possession of, whether with or without consideration.
>
> "(F) 'Knowingly' as used above means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." § 39-3010.

The Tennessee Court of Criminal Appeals affirmed the conviction and the Tennessee Supreme Court, which in an earlier case had held the motion pictures involved to be obscene within the meaning of the statute, *Taylor* v. *State ex rel. Kirkpatrick,* 529 S. W. 2d 692, 699 (1975), refused review.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, Tenn. Code Ann. § 39-3013 (A) is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment, and remand the case for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I, supra.* See *Wasserman* v. *Municipal Court of Alhambra Judicial District,* 413 U. S. 911 (1973) (BRENNAN, J., dissenting). In that circumstance, I have no occasion to consider whether the other questions presented in this case merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

No. 76-307. Wolery *v.* Ohio. Sup. Ct. Ohio. Motion of Association of Trial Lawyers of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 46 Ohio St. 2d 316, 348 N. E. 2d 351.

No. 76-377. Peplinski *v.* North Carolina; and

No. 76-5392. Smith *v.* North Carolina. Sup. Ct. N. C. The death penalty having been vacated by the Supreme Court of North Carolina, certiorari denied. Reported below: No. 76-377, 290 N. C. 236, 225 S. E. 2d 568; No. 76-5392, 290 N. C. 148, 226 S. E. 2d 10.

No. 76-5284. Spencer *v.* Georgia; and

No. 76-5373. Smith, aka Machetti *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Mr. Justice Brennan and Mr. Justice Marshall would grant certiorari and vacate judgments insofar as they leave undisturbed the sentence of death. See *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (Brennan, J., dissenting); *id.*, at 231 (Marshall, J., dissenting). Reported below: No. 76-5284, 236 Ga. 697, 224 S. E. 2d 910; No. 76-5373, 236 Ga. 12, 222 S. E. 2d 308.

No. 76-5326. Dukes *v.* Waitkevitch et al. C. A. 1st Cir. Certiorari denied. Reported below: 536 F. 2d 469.

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

The Court today refuses to review the Court of Appeals' conclusion that a black male charged with raping a white female in the racially troubled city of Boston is not entitled to have prospective jurors questioned about racial prejudice. I do not believe that the Court of Appeals' holding is justified by last Term's decision in *Ristaino* v. *Ross,* 424 U. S. 589 (1976).

Charges of interracial rape have long played a major role in the mythology of racial prejudice. See, *e. g., Powell* v.

*Alabama,* 287 U. S. 45 (1932); G. Allport, The Nature of Prejudice 349–355 (1958). When such a charge is made, especially in a city where racial conflict is close to the surface, it blinks reality to conclude, as the Court was able to find in *Ristaino,* that "[t]he circumstances . . . did not suggest a significant likelihood that racial prejudice might infect [petitioner's] trial." 424 U. S., at 598. Thus, under the standard set forth in *Ristaino,* this defendant was entitled to assure himself that the jury would consider only the evidence, not his race and the race of the alleged victim, when it determined his fate.

By refusing to review this conviction the Court does not, of course, endorse the Court of Appeals' understanding of *Ristaino.* It does, however, add to the lengthening " 'epitaph for those "essential demands of fairness" recognized by this Court 40 years ago in *Aldridge* [v. *United States,* 283 U. S. 308 (1931)].' " *Id.,* at 599 (MARSHALL, J., dissenting), quoting *Ross* v. *Massachusetts,* 414 U. S. 1080, 1085 (1973) (MARSHALL, J., dissenting from denial of certiorari). By failing to respond to those demands, the Court empties of meaning the promise of *Aldridge* and of our recent decision in *Ham* v. *South Carolina,* 409 U. S. 524 (1973). That promise is the fundamental guaranty of a fair trial before an impartial jury.

I respectfully dissent.

*Rehearing Denied*

No. 75–734. SMITH ET AL. *v.* TROYAN ET AL., 426 U. S. 934;

No. 75–1501. IVEY ET AL. *v.* UNITED STATES, *ante,* p. 818;

No. 75–6922. MASON ET AL. *v.* BELIEU ET AL., *ante,* p. 852;

No. 76–5030. BLACKBURN *v.* FLORIDA, *ante,* p. 864; and

No. 76–5078. MANNING *v.* PRINCETON CONSUMER DISCOUNT CO., INC., ET AL., *ante,* p. 865. Petitions for rehearing denied.

*Assignment Orders*

Orders of The Chief Justice designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit from December 6 to December 9, 1976, and in the United States Court of Appeals for the Eighth Circuit from February 14 to February 18, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), are ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

November 2, 1976

*Dismissal Under Rule 60*

No. 76-5103. Dawson *v.* United States. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 538 F. 2d 325.

November 8, 1976

*Affirmed on Appeal*

No. 76-65. Republican Party of Shelby County *v.* Dixon et al. Affirmed on appeal from D. C. W. D. Tenn. Mr. Justice Rehnquist and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 412 F. Supp. 1036.

*Appeal Dismissed*

No. 76-103. Rios et al. *v.* Jones, Director, Department of Personnel of Illinois, et al. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Mr. Justice Brennan would note probable jurisdiction and set case for oral argument. Reported below: 63 Ill. 2d 488, 348 N. E. 2d 825.

*Certiorari Granted—Vacated and Remanded*

No. 74-996. United States *v.* Data Products Corp. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Foster Lumber Co., ante,* p. 32.

*Miscellaneous Orders*

No. A-187 (76-326). HINSHAW *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE. Ct. App. Cal., 4th App. Dist. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-339. MINNESOTA PUBLIC INTEREST RESEARCH GROUP *v.* SECRETARY OF AGRICULTURE ET AL. Application to recall and stay mandate of the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE BRENNAN would grant the application. Motion to dispense with printing appendix to petition for certiorari granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application and motion.

No. A-346. BUCKLEY ET AL. *v.* MCRAE ET AL. Application for stay of order of the United States District Court for the Eastern District of New York, entered October 22, 1976, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-371 (75-1440). MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT *v.* ROE ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 428 U. S. 908.] Application for stay of judgment, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D-68. IN RE DISBARMENT OF HONOROFF. It is ordered that Alvin Eugene Honoroff, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-69. In re Disbarment of Lundy. It is ordered that Rayfield Lundy, of Compton, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-70. In re Disbarment of Weber. It is ordered that Jerome Weber, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-71. In re Disbarment of Mason. It is ordered that Richard W. Mason, Jr., of Kansas City, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-72. In re Disbarment of Maner. It is ordered that Charles A. Maner, Sr., of Knoxville, Tenn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-73. In re Disbarment of McGovern. It is ordered that John J. McGovern, of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-74. In re Disbarment of Foster. It is ordered that T. Russell Foster, of Charleston, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-75. In re Disbarment of Plenty. It is ordered that G. Richard Plenty, Jr., of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-76. In re Disbarment of Thompson. It is ordered that Frederick Thompson, of Woodbury, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-77. In re Disbarment of Lacinak. It is ordered that Michael A. Lacinak, of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-78. In re Disbarment of Moore. It is ordered that Earl H. Moore, Jr., of Dayton, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-79. In re Disbarment of Moore. It is ordered that Forrest P. Moore, of Logan, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75-503. Cook et al. *v.* Hudson et al. C. A. 5th Cir. [Certiorari granted, 424 U. S. 941.] Motion of petitioners for leave to file supplemental brief after argument granted.

No. 75-651. TEAMSTERS LOCAL UNION 657 *v.* RODRIGUEZ ET AL.; TEAMSTERS LOCAL UNION 657 *v.* HERRERA ET AL.; and TEAMSTERS LOCAL UNION 657 *v.* RESENDIS ET AL.;

No. 75-715. SOUTHERN CONFERENCE OF TEAMSTERS *v.* RODRIGUEZ ET AL.; SOUTHERN CONFERENCE OF TEAMSTERS *v.* HERRERA ET AL.; and SOUTHERN CONFERENCE OF TEAMSTERS *v.* RESENDIS ET AL.; and

No. 75-718. EAST TEXAS MOTOR FREIGHT SYSTEM, INC. *v.* RODRIGUEZ ET AL. C. A. 5th Cir. [Certiorari granted, 425 U. S. 990.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 75-978. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 4th Cir. [Certiorari granted, 425 U. S. 933.] Motion of American Iron and Steel Institute for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 75-1805. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 815.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted.

No. 76-5297. HAWKINS *v.* ESTELLE, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

*Certiorari Granted*

No. 76-357. LINMARK ASSOCIATES, INC., ET AL. *v.* TOWNSHIP OF WILLINGBORO ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 535 F. 2d 786.

No. 76-404. ILLINOIS BRICK CO. ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 536 F. 2d 1163.

No. 76-5206. ROBERTS *v.* LOUISIANA. Sup. Ct. La. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 331 So. 2d 11.

No. 75-1181. **Batterton, Secretary, Department of Human Resources of Maryland, et al.** *v.* **Francis et al.** C. A. 4th Cir. Motion of respondent Robert Francis for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 529 F. 2d 514 and 515.

No. 76-5306. **Dobbert** *v.* **Florida.** Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 328 So. 2d 433.

*Certiorari Denied*

No. 75-1673. **Sugg, aka Sanitora** *v.* **Illinois.** App. Ct. Ill., 1st Dist. Certiorari denied.

No. 75-1740. **Atkins** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 1352.

No. 75-1847. **Hammond** *v.* **United States**; and
No. 76-5178. **Thompson** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 2d 1006.

No. 75-6832. **Dowdy** *v.* **New York.** App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 76-24. **Rosenbruch** *v.* **American Export Isbrandtsen Lines, Inc.** C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 967.

No. 76-77. **Harris** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1255.

No. 76-95. **Hernandez** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 185.

No. 76-96. **Zeldin** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 782.

No. 76-106. **Librach** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 1228.

No. 76-113. **Feldman** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 1175.

No. 76-122. **Field** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 404.

No. 76-124. **Madrid** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1329.

No. 76-214. **Calnetics Corp. et al.** *v.* **Volkswagen of America, Inc., et al.**; and

No. 76-379. **Volkswagen of America, Inc., et al.** *v.* **Calnetics Corp. et al.** C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 674.

No. 76-238. **National Farmers' Organization, Inc.** *v.* **United States et al.** C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 113.

No. 76-261. **Rogers** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1134.

No. 76-286. **Robinson** *v.* **Henderson, Correctional Superintendent, et al.** C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 313.

No. 76-319. **Mickunas** *v.* **Kleppe, Secretary of the Interior, et al.** C. A. 9th Cir. Certiorari denied.

No. 76-368. **Markham** *v.* **Swails et al.** Ct. App. N. C. Certiorari denied. Reported below: 29 N. C. App. 205, 223 S. E. 2d 920.

No. 76-371. **Wood** *v.* **Stark Tri-County Building Trades Council et al.** C. A. 6th Cir. Certiorari denied.

No. 76-375. **Sonderegger** *v.* **Sagittarius Productions, Inc., et al.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-378. **Brockington** *v.* **New Jersey.** Super. Ct. N. J. Certiorari denied. Reported below: 140 N. J. Super. 422, 356 A. 2d 430.

No. 76-386. HICKLAND *v.* HICKLAND. Ct. App. N. Y. Certiorari denied. Reported below: 39 N. Y. 2d 1, 346 N. E. 2d 243.

No. 76-390. ICI AMERICA, INC. *v.* MORAINE PRODUCTS; and

No. 76-391. MORAINE PRODUCTS *v.* ICI AMERICA, INC. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 2d 134.

No. 76-392. FIRST NATIONAL BANK IN ST. LOUIS *v.* KOSTMAN, COMMISSIONER OF FINANCE OF MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 219.

No. 76-396. WRIGHT *v.* SOUTHWESTERN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 389.

No. 76-397. ALLRIGHT MISSOURI, INC., ET AL. *v.* CIVIC PLAZA REDEVELOPMENT CORP. ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 538 S. W. 2d 320.

No. 76-5035. MORGAN *v.* UNITED STATES; and

No. 76-5196. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 344.

No. 76-5037. STIDHAM *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 76-5053. HARRIS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 534 F. 2d 207.

No. 76-5077. MARI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 117.

No. 76-5085. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1303.

No. 76-5086. NEUMANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 713.

No. 76-5089. Payne *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 713.

No. 76-5090. Bowers *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 186.

No. 76-5094. Pritchard *v.* Ault, Commissioner, Department of Offender Rehabilitation, et al. C. A. 5th Cir. Certiorari denied.

No. 76-5105. Belle *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 537 F. 2d 979.

No. 76-5109. Holloway *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 1257.

No. 76-5116. Francisco *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 1293.

No. 76-5147. Jines *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 1255.

No. 76-5148. DeMase *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 340.

No. 76-5154. Diaz *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 323 So. 2d 289.

No. 76-5160. Terry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 753.

No. 76-5172. Kloner *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 730.

No. 76-5177. Patterson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 1037.

No. 76-5207. Zatko *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 76-5261. Harlin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 679.

No. 76-5262. Trotter *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 217.

No. 76-5266. Schreck *v.* Rauch, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 718.

No. 76-5372. Rodriguez *v.* Butler, Correctional Superintendent. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 982.

No. 76-5381. Walker *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 265 Ind. 8, 349 N. E. 2d 161.

No. 76-5393. Teague *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76-5394. Clark *v.* Rodriguez. C. A. 10th Cir. Certiorari denied.

No. 76-5399. Donley *v.* Scott. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 717.

No. 76-5400. Davis *v.* Pomars et al. C. A. 2d Cir. Certiorari denied.

No. 76-5409. Walker *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 350 N. E. 2d 678.

No. 76-5410. McNamara *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1373.

No. 76-5412. Johnson *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 554 P. 2d 51.

No. 76-5417. Alexander *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 336 So. 2d 768.

No. 76-5418. Zatko *v.* United States District Court for the Northern District of California. C. A. 9th Cir. Certiorari denied.

No. 76-5421. Smith *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 348 N. E. 2d 101.

No. 76-5422. Zatko *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 76-5429. Good *v.* Court of Common Pleas. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 322.

No. 76-5430. Forrester *v.* Levine, Industrial Commissioner of New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 51 App. Div. 2d 1077, 381 N. Y. S. 2d 149.

No. 76-5431. Stevenson et al. *v.* Reed et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1207.

No. 76-5450. Peters *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 397 Mich. 360, 244 N. W. 2d 898.

No. 76-5517. Bury *v.* Florida Department of Commerce et al. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 323 So. 2d 699.

No. 76-98. Baranov et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

Petitioners were convicted of mailing obscene materials in violation of 18 U. S. C. § 1461. I adhere to the view that this statute is " 'clearly overbroad and unconstitutional on its face.' " See, *e. g., Millican* v. *United States,* 418 U. S. 947, 948 (1974) (Brennan, J., dissenting), quoting *United States*

v. *Orito,* 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would grant certiorari and reverse.

No. 76-291. PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL. *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 533 F. 2d 1011.

No. 76-309. SIDLE *v.* MAJORS. C. A. 7th Cir. Certiorari denied. Reported below: 536 F. 2d 1156.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

This case presents the question whether the Indiana motor vehicle guest statute violates the Equal Protection Clause of the Fourteenth Amendment.[1] Forty-seven years ago *Silver* v. *Silver,* 280 U. S. 117 (1929), held that a Connecticut guest statute, providing that no person carried gratuitously as a guest in a motor vehicle might recover from the owner or operator for injuries caused by its negligent operation, was not in conflict with the Equal Protection Clause because of the distinction it made between passengers so carried and those in other classes of vehicles. The Court's rationale was that "it is not so evident that no grounds exist for the distinction that we can say *a priori* that the classification is one forbidden as without basis, and arbitrary." *Id.,* at 123. But under today's equal protection jurisprudence the classification must satisfy the standard of rationality, and the Court of Appeals in the instant case was of the view that the classification made by the Indiana statute could not be sustained under that standard: "We can find no necessary rational relation to a legitimate state interest . . . that would require us to sustain the legislation." 536 F. 2d 1156, 1159 (CA7 1976).

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[1] The Indiana statute, Ind. Code § 9-3-3-1 (1973), provides: "*Guest of owner of operator—Right to damages.*—The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle."

Within only the past five years high courts of no less than 17 States have examined or re-examined their automobile guest statutes challenged as denying equal protection, and almost one-half of those courts have struck down their State's statutes as unconstitutional under both the Federal and State Constitutions.[2] This conflict of view might rea-

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[2] These decisions are the culmination of many years of controversy over guest statutes. See, *e. g.*, W. Prosser, Law of Torts 186-187 (4th ed. 1971); Note, The Present Status of Automobile Guest Statutes, 59 Cornell L. Rev. 659 (1974); Lascher, Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute), 9 Santa Clara Law. 1 (1968); White, The Liability of an Automobile Driver to a Non-paying Passenger, 20 Va. L. Rev. 326 (1934).

Cases in which guest statutes have been held unconstitutional are: *McGeehan* v. *Bunch,* 88 N. M. 308, 540 P. 2d 238 (1975) (unconstitutional under both federal and state law); *Laakonen* v. *Eighth Judicial District Court,* 91 Nev. 506, 538 P. 2d 574 (1975) (unconstitutional under both federal and state law); *Manistee Bank & Trust Co.* v. *McGowan,* 394 Mich. 655, 232 N. W. 2d 636 (1975) (unconstitutional under state law); *Primes* v. *Tyler,* 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975) (unconstitutional under both federal and state law); *Thompson* v. *Hagan,* 96 Idaho 19, 523 P. 2d 1365 (1974) (unconstitutional under both federal and state law); *Henry* v. *Bauder,* 213 Kan. 751, 518 P. 2d 362 (1974) (unconstitutional under both federal and state law); *Johnson* v. *Hassett,* 217 N. W. 2d 771 (ND 1974) (unconstitutional under state law); *Brown* v. *Merlo,* 8 Cal. 3d 855, 506 P. 2d 212 (1973) (unconstitutional under both federal and state law).

Cases in which guest statutes have been held constitutional are: *Sidle* v. *Majors,* — Ind. —, 341 N. E. 2d 763 (1976) (on certified question to the Indiana Supreme Court from the Court of Appeals for the Seventh Circuit in the instant case); *Behrns* v. *Burke,* — S. D. —, 229 N. W. 2d 86 (1975); *White* v. *Hughes,* 257 Ark. 627, 519 S. W. 2d 70, dismissed for want of substantial federal question, 423 U. S. 805 (1975); *Richardson* sonably lead bench and bar to expect that this Court would grant review of a case that afforded an opportunity to re-examine *Silver* in light of today's rationality standard. But two Terms ago we summarily dismissed an appeal from the Utah Supreme Court sustaining the constitutionality of the Utah guest statute, which provides that a person injured while being transported gratuitously in any vehicle on a Utah public highway may not recover from the owner, driver, or person responsible for the operation of the vehicle, unless the injury was proximately caused by the intoxication or willful misconduct of the defendant. *Cannon* v. *Oviatt,* 419 U. S. 810 (1974). Today the Court denies the application for certiorari in this case involving the constitutionality of the Indiana guest statute, which is similar but not identical to the Utah statute. I respectfully dissent from the denial.

The Court of Appeals, despite its considered view that the Indiana statute was unconstitutional, sustained the statute because *Hicks* v. *Miranda,* 422 U. S. 332 (1975), decided a year after the summary dismissal in *Cannon* v. *Oviatt,* held that state and lower federal courts are as bound by our summary dispositions of appeals as by our dispositions after plenary consideration. 536 F. 2d, at 1160. Thus, even though the summary dismissal of *Cannon* v. *Oviatt* was made in the face of widespread conflict among state courts on the

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v. *Hansen,* 186 Colo. 346, 527 P. 2d 536 (1974); *Duerst* v. *Limbocker,* 269 Ore. 252, 525 P. 2d 99 (1974); *Cannon* v. *Oviatt,* 520 P. 2d 883 (Utah), dismissed for want of substantial federal question, 419 U. S. 810 (1974); *Keasling* v. *Thompson,* 217 N. W. 2d 687 (Iowa 1974); *Justice* v. *Gatchell,* 325 A. 2d 97 (Del. 1974); *Tisko* v. *Harrison,* 500 S. W. 2d 565 (Tex. Civ. App. 1973); *Delany* v. *Badame,* 49 Ill. 2d 168, 274 N. E. 2d 353 (1971).

One Federal Court of Appeals, sitting in admiralty, has refused to follow a state boat guest statute, but on statutory and common-law rather than constitutional grounds. *St. Hilaire Moye* v. *Henderson,* 496 F. 2d 973, 979-982 (CA8 1974).

impact of the Equal Protection Clause upon their guest statutes, was made without the benefit of briefs or oral argument on the merits, and was announced without opinion or even citation to *Silver* or any other precedent,[3] the Court denies certiorari in this case and perforce brings to a halt any further dialogue in either state or federal courts. This consequence of *Hicks* v. *Miranda* was anticipated in my dissent from denial of certiorari in *Colorado Springs Amusements, Ltd.* v. *Rizzo,* 428 U. S. 913 (1976). It is a consequence that must bode ill for developing constitutional jurisprudence. If significant constitutional issues are to be decided summarily without any briefing or oral argument, and with only momentary and offhanded Conference discussion, and if these summary dispositions nevertheless bind the courts of the 50 States and all lower federal courts, respect for our constitutional decisionmaking must inevitably be impaired.

When *Cannon* v. *Oviatt* was summarily dismissed, it is fair to say that not only legal scholars, judges of state and lower federal courts, and practicing attorneys, but also Members of this Court, assumed that summary dispositions without opinion did not have the same precedential force as decisions rendered with opinion after plenary consideration—indeed it was properly perceived that behind our summary dispositions of appeals lie many of the same considerations that account for denials of certiorari. See, *e. g., Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246 (1959); Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 12–14 (1930); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal

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[3] Perhaps the Utah and Indiana statutes can be distinguished, for "it may safely be said that there are as many different guest laws as there are acts." W. Prosser, Law of Torts 187 (4th ed. 1971). However, the Court of Appeals was in no position to say whether *Cannon* might be inapplicable for that reason since our bare dismissal gives not the slightest hint of the ground of the dismissal.

Courts and the Federal System 648–649 (2d ed. 1973); R. Stern & E. Gressman, Supreme Court Practice 195, 230–232 (4th ed. 1969).[4] Had the Court foreseen that *Hicks,* decided a year later, would convert the *Cannon* dismissal into an ironclad holding compelling the Court of Appeals in this case to abandon its own considered view of the merits, it seems probable that at the very least the Court, because of the doubts widely shared as to the continuing vitality of *Silver* v. *Silver,* would have given more thought to the propriety, even desirability, of a summary dismissal. I can say that I certainly would have done so.

*Hicks* has now eliminated from the consideration of appeals the desirable latitude each of us formerly had to weigh, as in the case of petitions for certiorari, whether the issue presented is sufficiently important to merit plenary review, and whether in any event the question might better be addressed after we have had the benefit of the views of other courts. Particularly unfortunate, I think, is the inevitability that *Hicks* will prematurely cut off, as it has in the case of these guest statutes, consideration of important and evolving federal constitutional questions by the state and lower federal courts. It frequently happens that difficult constitutional issues go through a valuable maturing process, and this Court and developing jurisprudence generally profit enormously from the accumulated wisdom of various courts that have considered the issues in a number of contexts and from a number of angles. *Hicks,* however, now mandates that summary dispositions must be followed as fully binding precedents by state and lower federal courts, regardless of the maturity of the issue, and regardless of the fact that even when the issue is before us for the first time, our disposition is made without opinion, without briefing or oral argument, and after only the most cursory Conference discussion.

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[4] A much commented upon example of a certiorari-like dismissal of a state court appeal is *Naim* v. *Naim,* 350 U. S. 985 (1956), dismissing 197 Va. 734, 90 S. E. 2d 849, which upheld the Virginia miscegenation statute later invalidated in *Loving* v. *Virginia,* 388 U. S. 1 (1967). For comment, compare H. Wechsler, Principles, Politics, and Fundamental Law 46–47 (1961), with A. Bickel, The Least Dangerous Branch 174 (1962), and Pollack, The Supreme Court and the States: Reflections on *Boynton* v. *Virginia,* 49 Calif. L. Rev. 15, 45 n. 79 (1961).

The interaction of *Hicks* v. *Miranda* and *Cannon* v. *Oviatt* upon the ferment in state courts over the constitutionality of automobile guest statutes reveals yet another reason for granting certiorari in this case. The operation of the *Hicks* rule on our review of state-court decisions concerning state statutes has an inevitable, and I think heretofore unappreciated, bias in favor of upholding those statutes: the state-court decisions, cited in n. 2, *supra*, striking down guest statutes held them to be unconstitutional under both the Federal Constitution and their own State Constitutions. Any attempt by this Court to review those decisions would have failed, since the decisions also rested on an adequate state ground. *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940). In practical effect, therefore, only a state-court decision sustaining a state statute against federal constitutional challenge could be a vehicle for review, which, as in *Cannon* v. *Oviatt*, would probably be by appeal and not by certiorari. 28 U. S. C. § 1257 (2). Since our practice of treating appeals similarly to petitions for certiorari has resulted in a number of dismissals that would probably not have been entered if the appeals had been treated fully and seriously on their merits, it follows that these dismissals have had an inevitable tendency to leave intact statutes that might not have survived plenary review in this Court.

Today's denial again leaves undisturbed, because of *Hicks*, a decision upholding a statute whose constitutionality is patently open to serious debate. This undesirable and, I must believe, largely unintended result should convince the Court that *Hicks* should be re-examined. At the very least, since *Cannon* v. *Oviatt* is not a precedent binding on us, *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974), the petition should be granted so that we may give plenary consideration to the constitutional issue that has stirred such conflict among state and lower federal courts.

No. 76–342. OLSON FARMS, INC. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 540 F. 2d 459.

No. 76–372. MICHIGAN *v.* JOHNSON. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that judgment below rests on adequate state grounds. Reported below: 396 Mich. 424, 240 N. W. 2d 729.

No. 76–395. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT *v.* SALAZAR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 538 F. 2d 269.

No. 76–5358. HENRY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: 328 So. 2d 430.

*Rehearing Denied*

No. 75–1490. ZIVIAK, ADMINISTRATOR *v.* UNITED STATES, *ante*, p. 801;

No. 75–6878. ANDERSON *v.* REED, PENITENTIARY SUPERINTENDENT, *ante*, p. 850;

No. 75–6918. TARKOWSKI *v.* SMART, *ante*, p. 852; and

No. 76–5023. BOECKENHAUPT *v.* UNITED STATES, *ante*, p. 863. Petitions for rehearing denied.

No. 76-5027. GINTER *v.* WISCONSIN, *ante,* p. 863. Petition for rehearing denied.

NOVEMBER 9, 1976

*Dismissal Under Rule 60*

No. 75-1919. CALIFORNIA ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 534 F. 2d 150.

NOVEMBER 10, 1976

*Miscellaneous Order*

No. A-387. OKLAHOMA PUBLISHING CO. *v.* DISTRICT COURT IN AND FOR OKLAHOMA COUNTY ET AL. Application for stay of order of the District Court in and for Oklahoma County, filed August 4, 1976, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied for failure to comply with Rule 27 of this Court, but without prejudice to reapplying for an appropriate order should compliance with Rule 27 be effected.

NOVEMBER 11, 1976

*Dismissal Under Rule 60*

No. 76-135. HANKISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 538 F. 2d 325.

NOVEMBER 12, 1976

*Miscellaneous Order*

No. A-384. MOREAU ET AL. *v.* TONRY ET AL. Application to vacate stay orders heretofore entered by the United States Court of Appeals for the Fifth Circuit, entered on November 3 and 4, 1976, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

### November 15, 1976

*Affirmed on Appeal*

No. 76–213. Dorgan, State Tax Commissioner of North Dakota, et al. *v.* United States et al. Affirmed on appeal from D. C. N. D. Reported below: 413 F. Supp. 173.

*Appeals Dismissed*

No. 76–440. Hyland, Hall & Co., et al. *v.* City of Madison et al. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction, it appearing that there is no final judgment of the highest court of a state wherein a judgment could be had as required by 28 U. S. C. § 1257. Reported below: 73 Wis. 2d 364, 243 N. W. 2d 422.

No. 76–5267. Gormally *v.* State Board of Elections. Appeal from Sup. Ct. R. I. dismissed for want of substantial federal question. Reported below: 117 R. I. 905, 362 A. 2d 156.

*Miscellaneous Orders*

No. A–367. Company *v.* United States. Application for bail pending appeal in the United States Court of Appeals for the Sixth Circuit, presented to Mr. Justice Stewart, and by him referred to the Court, denied. Reported below: 541 F. 2d 618.

No. A–375. Regents of the University of California *v.* Bakke. Application to stay execution and enforcement of mandate of the Supreme Court of California, presented to Mr. Justice Rehnquist, and by him referred to the Court, granted for a period of 30 days. If petition for writ of certiorari is filed within 30 days, stay is to remain in effect pending disposition of case in this Court.

No. D–80. In re Disbarment of Kates. It is ordered that Robert A. Kates, of Cleveland Heights, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-81. IN RE DISBARMENT OF DARROW. It is ordered that Charles M. Darrow, of Painesville, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-82. IN RE DISBARMENT OF KOCH. It is ordered that Karl A. Koch, of Woodstock, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-83. IN RE DISBARMENT OF BRIN. It is ordered that E. Stanley Brin, of Edina, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-84. IN RE DISBARMENT OF EDELSTEIN. It is ordered that Alan Earl Edelstein, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-85. IN RE DISBARMENT OF ROTHBART. It is ordered that Charles J. Rothbart, of Northglenn, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–86. In re Disbarment of Kuta. It is ordered that Frank John Kuta, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–87. In re Disbarment of Cohen. It is ordered that David Saul Cohen, of Glenview, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–88. In re Disbarment of Nowak. It is ordered that Joseph W. Nowak, of Calumet City, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the pracitce of law in this Court.

No. D–89. In re Disbarment of Avgerin. It is ordered that Constantine N. Avgerin, of Lake Bluff, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–90. In re Disbarment of Bushman. It is ordered that Ted Bushman, of Santa Maria, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–91. In re Disbarment of Leonard. It is ordered that John M. Leonard, Jr., of Hinsdale, Ill., be suspended from the pratice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-92. In re Disbarment of Anderson. It is ordered the Dale Anderson, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-93. In re Disbarment of Hendler. It is ordered that Jack Alan Hendler, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75-562. Rosebud Sioux Tribe *v.* Kneip, Governor of South Dakota, et al. C. A. 8th Cir. [Certiorari granted, 425 U. S. 989.] Motion of the Solicitor General to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Respondent allotted 15 additional minutes to present oral argument.

No. 75-978. E. I. du Pont de Nemours & Co. et al. *v.* Train, Administrator, Environmental Protection Agency, et al. C. A. 4th Cir. [Certiorari granted, 425 U. S. 933];

No. 75-1473. E. I. du Pont de Nemours & Co. et al. *v.* Train, Administrator, Environmental Protection Agency; and

No. 75-1705. Train, Administrator, Environmental Protection Agency *v.* E. I. du Pont de Nemours & Co. et al. C. A. 4th Cir. [Certiorari granted, 426 U. S. 947.] Joint motion to consolidate granted and a total of two hours allotted for oral argument. Mr. Justice Powell took no part in the consideration or decision of this motion.

No. 75-1267. Bayside Enterprises, Inc., et al. *v.* National Labor Relations Board. C. A. 1st Cir. [Certiorari granted, 425 U. S. 970.] Motion of Georgia Poultry Federation, Inc., for leave to file a brief as *amicus curiae* denied.

No. 75-1064. Kremens, Hospital Director, et al. *v.* Bartley et al. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 424 U. S. 964.] Motion of Bernard G. Segal, Esquire, on behalf of the Supreme Court of Pennsylvania, for additional time to participate in oral argument as *amicus curiae* denied. Alternative request for divided argument granted.

No. 75-1150. City of Philadelphia et al. *v.* New Jersey et al. Appeal from Sup. Ct. N. J. [Probable jurisdiction noted, 425 U. S. 910.] Motion of appellants for leave to file supplemental brief after argument granted and each side is given 21 days within which to file such a brief. Request for further oral argument denied.

No. 75-1578. Wainwright, Secretary, Department of Offender Rehabilitation of Florida *v.* Sykes. C. A. 5th Cir. [Certiorari granted, *ante,* p. 883.] Motion of respondent for appointment of counsel granted, and it is ordered that William F. Casler, Esquire, of St. Petersburg Beach, Fla., is appointed to serve as counsel for respondent in this case.

No. 75-1687. United States Trust Company of New York, Trustees *v.* New Jersey et al. Appeal from Sup. Ct. N. J. [Probable jurisdiction noted, 427 U. S. 903.] Motion of Securities Industry Assn. for leave to file a reply brief as *amicus curiae* denied.

No. 75-1693. Blackledge, Warden, et al. *v.* Allison. C. A. 4th Cir. [Certiorari granted, *ante,* p. 814.] Motion of respondent for appointment of counsel granted, and it is ordered that C. Frank Goldsmith, Jr., Esquire, of Marion, N. C., is appointed to serve as counsel for respondent in this case.

No. 76-5433. Tecton *v.* Merhige et al., U. S. District Judges. Motion for leave to file petition for writ of prohibition denied.

No. 76-180. SMITH, ADMINISTRATOR, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY & REFORM ET AL.;

No. 76-183. SHAPIRO, EXECUTIVE DIRECTOR, NEW YORK STATE BOARD OF SOCIAL WELFARE, ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY & REFORM ET AL.;

No. 76-5193. RODRIGUEZ ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY & REFORM ET AL.; and

No. 76-5200. GANDY ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY & REFORM ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante,* p. 883.] Motion of appellee foster parents for appointment of independent counsel to represent appellant foster children denied.

No. 76-235. WRIGHT, DIRECTOR, DEPARTMENT OF TRANSPORTATION OF HAWAII *v.* STOP H-3 ASSN. ET AL. C. A. 9th Cir. Motion of the State of Washington for leave to file a brief as *amicus curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

*Certiorari Granted*

No. 76-321. STENCEL AERO ENGINEERING CORP. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Reported below: 536 F. 2d 765.

No. 76-447. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 540 F. 2d 229.

No. 75-1126. TRANS WORLD AIRLINES, INC. *v.* HARDISON ET AL.; and

No. 75-1385. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, ET AL. *v.* HARDISON ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 527 F. 2d 33.

No. 76-439. **Territory of Guam** *v.* **Olsen.** C. A. 9th Cir. Certiorari granted. Reported below: 540 F. 2d 1011.

*Certiorari Denied*

No. 75-1511. **Williams** *v.* **Southern Union Gas Co.** C. A. 10th Cir. Certiorari denied. Reported below: 529 F. 2d 483.

No. 75-1741. **Chrysler Corp.** *v.* **Lacy.** C. A. 8th Cir. Certiorari denied. Reported below: 533 F. 2d 353.

No. 75-6227. **Allegretti** *v.* **Casscles, Correctional Superintendent.** App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 1015, 372 N. Y. S. 2d 1019.

No. 75-6737. **Tubbs** *v.* **Maggio, Warden.** C. A. 5th Cir. Certiorari denied.

No. 75-6888. **Walker** *v.* **California.** Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 75-6955. **Van Curen** *v.* **Ohio Adult Parole Authority et al.** Sup. Ct. Ohio. Certiorari denied. Reported below: 45 Ohio St. 2d 298, 345 N. E. 2d 75.

No. 76-94. **Henry, aka Obadele** *v.* **United States;**
No. 76-5004. **Shillingford** *v.* **United States;**
No. 76-5181. **Norman, aka Ana** *v.* **United States;** and
No. 76-5182. **Austin, aka Quaddus, et al.** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 999.

No. 76-157. **Intrieri** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 539 F. 2d 703.

No. 76-162. **Robbins et al.** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1256.

No. 76-166. **Dixon** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 812.

No. 76-175. O'Malley *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 535 F. 2d 589.

No. 76-176. Alessi *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 1139.

No. 76-195. Roberts *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1305.

No. 76-202. Supinski *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 713.

No. 76-203. King *v.* United States; and
No. 76-346. Jones *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 505.

No. 76-215. Drumright *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 534 F. 2d 1383.

No. 76-216. Cordova *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 537 F. 2d 1073.

No. 76-229. Alphin et al. *v.* Henson et al. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 85.

No. 76-230. Giskin *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 315.

No. 76-231. Board of Supervisors of Fairfax County, Virginia, et al. *v.* Coleman et al. C. A. D. C. Cir. Certiorari denied.

No. 76-234. O'Donnell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 1233.

No. 76-304. Burns *v.* East Baton Rouge Parish School Board et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1201.

No. 76-317. O-J Transport Co. *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 126.

No. 76-411. TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354 *v.* BROADWAY THEATRE LEAGUE OF TULSA, INC. Sup. Ct. Okla. Certiorari denied. Reported below: 550 P. 2d 922.

No. 76-426. FELDMAN ET AL. *v.* KUNKIN. C. A. 9th Cir. Certiorari denied.

No. 76-428. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. *v.* NORTHEAST AIRLINES, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 536 F. 2d 975.

No. 76-433. FAVROT *v.* BARNES. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 332 So. 2d 873.

No. 76-511. SALOMON ET AL. *v.* CROWN LIFE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 1233.

No. 76-5041. WONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76-5073. PAPA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 815.

No. 76-5129. LEE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 76-5135. PERNO *v.* UNITED STATES; and
No. 76-5211. CAPITO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 76-5135, 538 F. 2d 343; No. 76-5211, 538 F. 2d 340.

No. 76-5137. GAITHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 363, 535 F. 2d 1325.

No. 76-5153. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 76-5157. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 536 F. 2d 1343.

No. 76-5185. EDMONDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5186. TYCZKOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 76-5189. CHAVEZ-CORTINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1142.

No. 76-5203. BERRY *v.* ARNOLD, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 321.

No. 76-5210. CURTIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 537 F. 2d 1091.

No. 76-5212. HAMPTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76-5220. NUNLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76-5221. AEBISCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76-5226. TRUAX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76-5234. DININO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 315.

No. 76-5245. FARRIES *v.* UNITED STATES PAROLE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 1258.

No. 76-5253. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-5254. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-5258. TUCKER *v.* UNITED STATES; and

No. 76-5259. CLARDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 2d 439.

No. 76-5312. MAPP *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 45 App. Div. 2d 1054, 358 N. Y. S. 2d 675.

No. 76-5315. ANGULO-MARRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5319. STEVENS *v.* WARDEN, LEAVENWORTH PENITENTIARY. C. A. 10th Cir. Certiorari denied. Reported below: 536 F. 2d 1334.

No. 76-5327. POKINI *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 57 Haw. 26, 548 P. 2d 1402.

No. 76-5336. VILLALOBOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1386.

No. 76-5391. TENSLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 76-5401. TECTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 706.

No. 76-5423. KELLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 1199.

No. 76-5434. PARHAM *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 333 So. 2d 912.

No. 76-5436. LIPTROTH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 335 So. 2d 683.

No. 76-5442. BUSSEY *v.* HARRISON ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–5457. Zatko *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 76–5466. Brown *v.* Bollinger et al. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 335.

No. 76–5479. Zatko *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 75–1105. Reid *v.* Memphis Publishing Co. C. A. 6th Cir. Motion of General Conference of Seventh-Day Adventists for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 521 F. 2d 512.

No. 76–278. Jolley *v.* United States. C. A. 6th Cir. Motion to strike respondent's brief and certiorari denied. Reported below: 538 F. 2d 330.

No. 76–318. Bykofsky et al. *v.* Borough of Middletown et al. C. A. 3d Cir. Certiorari denied. Mr. Justice White would grant certiorari and set case for oral argument. Reported below: 535 F. 2d 1245.

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

Petitioners challenge the constitutionality of an ordinance establishing a nonemergency curfew for juveniles in Middletown, Pa., a rural community with a population of about 10,000. That ordinance makes it unlawful, except in limited circumstances, for minors to be on the streets during specified hours, and for parents knowingly or "by inefficient control" to allow their children to do so.

The freedom to leave one's house and move about at will is "of the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937), and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment. See, *e. g., Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972); *Coates* v. *City of Cin-*

*cinnati,* 402 U. S. 611 (1971); *Hague* v. *C. I. O.,* 307 U. S. 496, 515 (1939). To justify a law that significantly intrudes on this freedom, therefore, a State must demonstrate that the law is "narrowly drawn" to further a "compelling state interest." *Roe* v. *Wade,* 410 U. S. 113, 155–156 (1973). For this reason, I have little doubt but that, absent a genuine emergency, see, *e. g., United States* v. *Chalk,* 441 F. 2d 1277 (CA4 1971), a curfew aimed at all citizens could not survive constitutional scrutiny. This is true even though such a general curfew, like the instant ordinance, would protect those subject to it from injury and prevent them from causing "nocturnal mischief."

The question squarely presented by this case, then, is whether the due process rights of juveniles are entitled to lesser protection than those of adults.[1] The prior decisions of this Court provide no clear answer. We have recognized that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood* v. *Danforth,* 428 U. S. 52, 74 (1976); see also *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 511 (1969). But we also have acknowledged that "the State has somewhat broader authority to regulate the activities of children than of adults." *Planned Parenthood* v. *Danforth, supra,* at 74; see also *Ginsberg* v. *New York,* 390 U. S. 629 (1968); *Prince* v. *Massachusetts,* 321 U. S. 158 (1944). Not surprisingly, therefore, the lower courts have reached conflicting conclusions in addressing the issue raised here. Annot., 59 A. L. R. 3d 321, 339–348 (1974).

Because I believe this case poses a substantial constitutional question—one which is of importance to thousands of towns with similar ordinances[2]—I would grant a writ of certiorari.

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[1] Similar issues currently are pending before the Court in No. 75–1064, *Kremens* v. *Bartley,* probable jurisdiction noted, 424 U. S. 964 (1976).

No. 76-421. CALIFORNIA *v.* MOBBS. Ct. App. Cal., 2d App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 76-436. DUPONT CIRCLE CITIZENS ASSN. *v.* DISTRICT OF COLUMBIA ZONING COMMISSION ET AL. Ct. App. D. C. Motion to defer consideration of petition and certiorari denied. Reported below: 355 A. 2d 550.

No. 76-437. PEPSI COLA BOTTLING CO. OF PENNSAUKEN *v.* LOWENSTEIN ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari. Reported below: 536 F. 2d 9.

No. 76-5152. STOCKHEIMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970). Reported below: 534 F. 2d 331.

No. 76-441. RIEGEL TEXTILE CORP. *v.* CENTRAL OF GEORGIA RAILWAY CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 529 F. 2d 833.

*Rehearing Denied*

No. 75-1555. CONLEY *v.* HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., *ante,* p. 820;

No. 75-1670. LEVY ET AL. *v.* CITY OF NEW YORK ET AL., *ante,* p. 805;

No. 75-6766. COLLINS *v.* ARKANSAS, *ante,* p. 808;

No. 75-6797. NEAL *v.* ARKANSAS, *ante,* p. 808;

No. 75-6858. COX *v.* MISSISSIPPI, *ante,* p. 849; and

No. 76-111. SALVUCCI *v.* NEW HAMPSHIRE JOCKEY CLUB, INC., ET AL., *ante,* p. 860. Petitions for rehearing denied.

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[2] See Note, Curfew Ordinances and the Control of Nocturnal Juvenile Crime, 107 U. Pa. L. Rev. 66 (1958).

No. 76–5074. **Burke** *v.* **Supreme Court et al.**, *ante*, p. 888. Petition for rehearing denied.

## November 17, 1976

### *Dismissal Under Rule 60*

No. 76–639. **American Paper Institute, Inc., et al.** *v.* **Train, Administrator, Environmental Protection Agency, et al.** C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 177 U. S. App. D. C. 181, 543 F. 2d 328.

## November 19, 1976

### *Dismissal Under Rule 60*

No. 75–6992. **Roldan et al.** *v.* **Minter et al.** Appeal from D. C. Mass. Certiorari dismissed under this Court's Rule 60. Reported below: 409 F. Supp. 663.

## November 24, 1976

### *Miscellaneous Order*

No. A–423. **Oklahoma Publishing Co.** *v.* **District Court in and for Oklahoma County, Oklahoma, et al.** This is a renewed application for partial stay of a pretrial order of the District Court of Oklahoma County, Oklahoma, pending filing and disposition of a petition for certiorari. The order enjoined law enforcement officials and other public employees, as well as prosecution and defense counsel, "from disclosing any information or making any comment concerning" a delinquency proceeding then pending in that court against a juvenile. The order also restrained all members of the news media from "publishing, broadcasting or disseminating, in any manner, the name or picture of said minor child in connection with this pending case." On application for prohibition and mandamus challenging the restraint on the press, the Oklahoma Supreme Court sustained the order. The application for stay here filed by Oklahoma Publishing Co. also challenges only the injunction against publishing the name and picture of the minor. It does not challenge the restraint on counsel or public employees; nor does it challenge the Oklahoma statute requiring juvenile proceedings to be held in private unless specifically ordered by the judge to be open to the public.

It appearing that the name and picture of the minor involved in this case were made available to the public as a result of a hearing held at the outset of this case which was in fact open to the press, the application for stay of the order enjoining publication of the name or picture of the minor, presented to MR. JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition of a petition for certiorari unless earlier terminated by further order of the Court. *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 567–568 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 491, 495 (1975).

MR. JUSTICE BRENNAN, while not subscribing to this order, would also grant the stay.

### NOVEMBER 29, 1976

*Affirmed on Appeal*

No. 76–373. INTERSTATE COMMERCE COMMISSION *v.* CENTRAL OF GEORGIA RAILROAD CO. ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 410 F. Supp. 354.

No. 76–431. SENDAK, ATTORNEY GENERAL OF INDIANA *v.* ARNOLD ET AL. Affirmed on appeal from D. C. S. D. Ind. Reported below: 416 F. Supp. 22.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Indiana has passed a statute requiring first trimester abortions to be performed by a

> "physician in a hospital or a licensed health facility as

> defined in I. C. 1971, 16–10–2, which offers the basic safeguards as provided by a hospital admission, and has immediate hospital backup . . . ." Ind. Code § 35–1–58.5–2 (a)(1) (1975).

Without inquiring into the question whether this statute is a reasonable method of protecting the health of the mother, a three-judge District Court for the Southern District of Indiana held the statutory provision unconstitutional. This Court affirms summarily. There is nothing in the United States Constitution which limits the State's power to require that medical procedures be done safely, and were it not for some language in this Court's recent decisions in cases touching on abortion, the District Court's decision should and would be summarily reversed. Because I do not believe that the language in this Court's recent abortion decisions compels the extraordinary result reached by the District Court, I dissent from the summary affirmance and would note probable jurisdiction and set the case for oral argument.

In *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), this Court held that a pregnant woman has a constitutional right to be free from state prohibition in making her decision to abort a fetus. So far as I can tell, those cases do not elevate the decision to have an abortion to a higher constitutional status than the decision to have life-saving or health-preserving operations. Clearly, all such operations are subject to reasonable regulation by state legislatures to assure that they are performed safely.

The lower court struck down the statute in this case without inquiring whether it was a reasonable health regulation. In doing so, the court relied on the following language in *Roe* v. *Wade, supra,* at 163:

> "It follows that, from and after this point [*i. e.,* the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

> Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.
>
> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

Read literally, this language would prevent the State from passing *any* health or safety regulations applicable to abortions performed in the first trimester no matter what the risk to maternal health. Plainly, the language cannot be read literally, and we have declined to so read it in the past. In *Connecticut* v. *Menillo,* 423 U. S. 9 (1975), we sustained a statute which proscribed abortion by a nonphysician saying:

> "*Roe* teaches that a State cannot restrict a decision by a woman, with the advice of her physician, to terminate her pregnancy during the first trimester because neither its interest in maternal health nor its interest in the potential life of the fetus is sufficiently great at that stage. But the insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion's being as safe for the woman as normal childbirth at term, and *that predicate holds true only if the abortion is performed* by medically competent personnel *under conditions insuring maximum safety for the woman.* See 410 U. S., at 149–150, 163; cf. statement

> of DOUGLAS, J., in *Cheaney* v. *Indiana,* 410 U. S. 991 (1973), denying certiorari in 259 Ind. 138, 285 N. E. 2d 265 (1972). Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference. . . ." *Id.,* at 10–11. (Emphasis added.)

Here, the Indiana statute seeks to insure that the "abortion is performed . . . under conditions insuring maximum safety for the woman." Absent a finding that the statute does not reasonably achieve its purpose, it cannot properly be held unconstitutional.

The court below also relied on this Court's holding in *Doe* v. *Bolton, supra,* at 195, invalidating a requirement that abortions be performed only in hospitals accredited by the Joint Committee on Accreditation of Hospitals, a private organization. The Court there said:

> "Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications. The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, *rather than those of some other appropriately licensed institution,* satisfy these health interests." (Emphasis added.)

Here there was no trial, there were no facts presented to the District Court in any other form, and no finding that the requirement of Indiana law is unreasonable. In any event, Indiana has provided that abortions may be performed in "other appropriately licensed institution[s]." *Doe* v. *Bolton*, *supra*, is thus no support for the lower court's finding.*

Statutes passed by the legislatures of the States may not be so lightly struck down. Normal principles of constitutional adjudication apply even in cases dealing with abortion. I therefore respectfully dissent from affirmance and would note probable jurisdiction and set this case for oral argument.

No. 76-492. EXON, GOVERNOR OF NEBRASKA, ET AL. *v.* MCCARTHY ET AL. Affirmed on appeal from D. C. Neb.

*Appeals Dismissed*

No. 76-401. CITY OF LAWRENCE *v.* CITY OF INDIANAPOLIS ET AL. Appeal from Ct. App. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Ind. App. —, 338 N. E. 2d 683.

No. 76-5240. MOSER *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 25 Ore. App. 221, 548 P. 2d 508.

No. 76-5514. RAITPORT *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-5523. JOHNSON *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers

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*The Court in *Doe* v. *Bolton*, 410 U. S. 179 (1973), also relied for its holding on the language in *Roe* v. *Wade*, 410 U. S. 113 (1973), quoted above, indicating that all health regulations with respect to first trimester abortions are invalid. As already noted, the language is not to be applied literally.

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 26 Ore. App. 357, 552 P. 2d 268.

No. 76–416. Delaware State Board of Education et al. *v.* Evans et al.;

No. 76–474. Newark School District *v.* Evans et al.;

No. 76–475. New Castle-Gunning Bedford School District *v.* Evans et al.;

No. 76–499. Mount Pleasant School District et al. *v.* Evans et al.;

No. 76–500. Marshallton-McKean School District *v.* Evans et al.; and

No. 76–501. Claymont School District et al. *v.* Evans et al. Appeals from D. C. Del. dismissed for want of jurisdiction. Mr. Justice Marshall took no part in the consideration or decision of these cases. Reported below: 416 F. Supp. 328.

No. 76–469. Gragg *v.* Cayuga Independent School District. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 539 S. W. 2d 861.

*Certiorari Granted—Vacated and Remanded*

No. 76–385. General Atomic Co. *v.* Felter, Judge, et al. Sup. Ct. N. M. Certiorari granted, judgment vacated, and case remanded to consider whether judgment is based upon federal or state grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972).

*Vacated and Remanded on Writ of Certiorari*

No. 75–1413. Stanton, Administrator, Indiana State Department of Public Welfare, et al. *v.* Bond et al. C. A. 7th Cir. [Certiorari granted, 426 U. S. 905.] Judgment vacated and case remanded for further consideration in light of Pub. L. 94–559, 90 Stat. 2641 (Oct. 19, 1976). Mr. Justice Stevens took no part in the consideration or decision of this case. Reported below: 528 F. 2d 688.

*Miscellaneous Orders*

No. A–327 (76–5549). SKINNER *v.* UNITED STATES. C. A. 5th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–360. RADDA *v.* ACITO ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Application for stay, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 75–699. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* GOLDFARB. Appeal from D. C. E. D. N. Y. [Probable jurisdiction noted, 424 U. S. 906.] Motion of appellee for leave to file supplemental brief after argument granted.

No. 75–1261. KNEBEL, SECRETARY OF AGRICULTURE *v.* HEIN ET AL.; and

No. 75–1355. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* HEIN ET AL. Appeals from D. C. S. D. Iowa. [Probable jurisdiction noted, 426 U. S. 904.] Motion of appellants for divided argument granted. Motion of the Solicitor General to permit Stephen L. Urbanczyk, Esquire, to argue *pro hac vice* on behalf of appellant in No. 75–1261 granted.

No. 75–1631. KIRKLAND ET AL. *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES ET AL., *ante*, p. 823;

No. 75–1694. JONES ET AL. *v.* NEW YORK CITY HUMAN RESOURCES ADMINISTRATION ET AL., *ante*, p. 825; and

No. 75–6782. DOUGLAS *v.* FLORIDA, *ante*, p. 871. Counsel for respondents requested to file responses to petitions for rehearing within 30 days.

No. 75–1707. OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. *v.* HODORY. Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, *ante*, p. 814.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 76–1721. United States *v.* Chadwick et al. C. A. 1st Cir. [Certiorari granted, *ante*, p. 814.] Motion of Americans for Effective Law Enforcement, Inc., et al., for leave to file a brief as *amici curiae* granted.

No. 75–6297. Fiallo, a minor, by Rodriguez, et al. *v.* Levi, Attorney General, et al. Appeal from D. C. E. D. N. Y. [Probable jurisdiction noted, 426 U. S. 919.] Motion of John E. Kirklin, Esquire, to permit Janet M. Calvo to argue *pro hac vice* on behalf of appellants granted.

No. 75–6527. Ingraham et al. *v.* Wright et al. C. A. 5th Cir. [Certiorari granted, 425 U. S. 990.] Motion of American Psychological Association Task Force on the Rights of Children and Youth for leave to file a brief as *amicus curiae* after argument denied.

No. 76–358. New York *v.* Brown. Ct. App. N. Y. Motion to grant certiorari and set case for oral argument with No. 76–120, *United States* v. *Martin Linen Supply Co.*, denied.

No. 76–672. Burlington Northern, Inc., et al. *v.* Sterling Colorado Beef Co. et al. Appeal from D. C. Colo. Motion of appellee Sterling Colorado Beef Co. to expedite disposition of appeal denied.

No. 76–5206. Roberts *v.* Louisiana. C. A. 4th Cir. Certiorari having been granted on November 8, 1976 [*ante*, p. 938], grant is hereby limited to the following question: "Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

No. 76–5644. Guerrero *v.* Estelle, Corrections Director. Motion for leave to file petition for writ of habeas corpus denied.

*Probable Jurisdiction Noted*

No. 75–1605. NIXON *v.* ADMINISTRATOR OF GENERAL SERVICES ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 408 F. Supp. 321.

No. 75–1874. JONES, SECRETARY, DEPARTMENT OF CORRECTION OF NORTH CAROLINA, ET AL. *v.* NORTH CAROLINA PRISONERS' LABOR UNION, INC. Appeal from D. C. E. D. N. C. Probable jurisdiction noted. Reported below: 409 F. Supp. 937.

No. 76–422. DOTHARD, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ALABAMA, ET AL. *v.* RAWLINSON ET AL. Appeal from D. C. M. D. Ala. Probable jurisdiction noted. Reported below: 418 F. Supp. 1169.

*Certiorari Granted*

No. 76–423. PUYALLUP TRIBE, INC., ET AL. *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL. Sup. Ct. Wash. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 86 Wash. 2d 664, 548 P. 2d 1058.

*Certiorari Denied.* (See also Nos. 76–401, 76–5240, 76–5514, and 76–5523, *supra.*)

No. 75–6968. SWEENEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 747.

No. 76–18. FLORES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 222.

No. 76–19. HENNING, AKA WARREN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 746.

No. 76–62. EISENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 315.

No. 76-105. **Faith Hospital Assn. v. Blue Cross Hospital Service, Inc., of St. Louis et al.**; and

No. 76-141. **St. Louis University v. Blue Cross Hospital Service, Inc., of St. Louis et al.** C. A. 8th Cir. Certiorari denied. Reported below: No. 76-105, 537 F. 2d 294; No. 76-141, 537 F. 2d 283.

No. 76-130. **Pennsylvania et al. v. Kobelinski, Administrator, Small Business Administration, et al.** C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 441, 533 F. 2d 668.

No. 76-136. **Herrera v. California.** App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 76-184. **Lovisi et ux. v. Zahradnick, Penitentiary Superintendent, et al.** C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 349.

No. 76-237. **In re Application of Hay.** C. C. P. A. Certiorari denied. Reported below: 534 F. 2d 917.

No. 76-239. **Bamford et al. v. Garrett et al.** C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 63.

No. 76-246. **Velasco et al. v. United States.** C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 707.

No. 76-249. **Poll v. United States.** C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 845.

No. 76-267. **Fletcher v. United States.** Ct. App. D. C. Certiorari denied. Reported below: 358 A. 2d 322.

No. 76-268. **Almendarez v. United States.** C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 648.

No. 76-284. **Sun Shipbuilding & Dry Dock Co. v. United States et al.** Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 680, 538 F. 2d 348.

No. 76-271. BANK OF THE COMMONWEALTH *v.* ISRAEL-BRITISH BANK (LONDON), LTD., ET AL.; and

No. 76-272. FEDERAL DEPOSIT INSURANCE CORP. *v.* ISRAEL-BRITISH BANK (LONDON), LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 509.

No. 76-294. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 53.

No. 76-296. ADCOX *v.* CADDO PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 973.

No. 76-302. ALLEN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 320.

No. 76-314. WUCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 1200.

No. 76-320. DOVER CORP., NORRIS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 535 F. 2d 1205.

No. 76-325. THORNTON ET AL., ADMINISTRATORS *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 240, 539 F. 2d 242.

No. 76-329. CORDECO DEVELOPMENT CORP. *v.* VASQUEZ ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 539 F. 2d 256.

No. 76-330. PARKER *v.* BOORSTIN, LIBRARIAN OF CONGRESS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76-345. VARDY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 404.

No. 76-347. PATTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 76-351. Boteler, Director, Mississippi State Highway Department *v.* National Wildlife Federation et al. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 359.

No. 76-354. Vasquez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1142.

No. 76-363. Amshu Associates, Inc. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 312.

No. 76-380. Gino et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 833.

No. 76-382. Carborundum Co. *v.* United States. C. C. P. A. Certiorari denied. Reported below: 63 C. C. P. A. (Cust.) 98, 536 F. 2d 373.

No. 76-400. Jones et al. *v.* Pacific Intermountain Express et al. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 817.

No. 76-403. Fenlon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 340.

No. 76-409. Board of Trustees of Bloomsburg State College et al. *v.* Skehan. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 53.

No. 76-417. Kielwein *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 2d 676.

No. 76-424. Saia Electric, Inc. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-425. Saia et ux. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-430. ESTATE OF KLEIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 701.

No. 76-472. COON ET UX. *v.* CHARLES W. BLIVEN & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 44.

No. 76-473. REYHER *v.* CHILDREN'S TELEVISION WORKSHOP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 87.

No. 76-477. MCNAMARA ET AL. *v.* TCS-1 ET AL. Sup. Ct. Pa. Certiorari denied.

No. 76-479. ZACHRY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 260 Ark. 97, 538 S. W. 2d 25.

No. 76-485. FORD *v.* HARRIS COUNTY MEDICAL SOCIETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 321.

No. 76-505. LORA ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 311.

No. 76-508. KAYSER-ROTH CORP. *v.* TIGHTS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 2d 1047.

No. 76-521. SMITH *v.* GRIMM ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 534 F. 2d 1346.

No. 76-527. LOWE *v.* CITY OF JACKSON. Sup. Ct. Miss. Certiorari denied. Reported below: 336 So. 2d 490.

No. 76-582. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 1002.

No. 76-591. BORRAYO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1141.

No. 76-606. Erb *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 438.

No. 76-5062. Marsh *v.* Cupp, Penitentiary Superintendent. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 1287.

No. 76-5101. Hofmann *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 332 So. 2d 18.

No. 76-5110. Houston *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76-5119. Bankhead *v.* Cowin et al. C. A. 2d Cir. Certiorari denied.

No. 76-5130. Hernandez-Lopez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 284.

No. 76-5140. Burko *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 28 Md. App. 732, 349 A. 2d 355.

No. 76-5144. Zilka *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 388.

No. 76-5174. Toothman *v.* Ohio. Ct. App. Ohio, Summit County. Certiorari denied.

No. 76-5176. Gray *v.* Reed, Acting Chairman, U. S. Parole Commission, et al. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1008.

No. 76-5179. Kaufman *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 331 So. 2d 16.

No. 76-5188. Brockett *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76-5228. Rudolph *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 332 So. 2d 806.

No. 76-5249. Effler *v.* Rose, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 980.

No. 76-5250. Wilson et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 1145.

No. 76-5251. Cole *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1039.

No. 76-5255. Thomas et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 344.

No. 76-5260. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 711.

No. 76-5263. Taylor *v.* Florida. C. A. 5th Cir. Certiorari denied.

No. 76-5268. Wilson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 883.

No. 76-5269. Estell et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 539 F. 2d 697.

No. 76-5273. Kenyon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5275. Mapp *v.* Warden, New York State Correctional Institution for Women. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 1167.

No. 76-5276. Ferranto *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 76-5277. Walker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 896.

No. 76-5282. **Rivera** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 539 F. 2d 287.

No. 76-5287. **Logan** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 76-5291. **Joyner** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 539 F. 2d 1162.

No. 76-5292. **Ingram** *v.* **United States.** C. A. 7th Cir. Certiorari denied.

No. 76-5295. **Silverstein** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5305. **Kesner** *v.* **National Labor Relations Board.** C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 1169.

No. 76-5307. **Mathis** *v.* **Secretary of Defense.** C. A. D. C. Cir. Certiorari denied.

No. 76-5309. **Brooks et al.** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 76-5310. **Ortiz-Aguayo** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5320. **Kessler** *v.* **Wise, Warden.** C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 336.

No. 76-5321. **Pless** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 1140.

No. 76-5322. **Daniel** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 706.

No. 76-5328. **Coleman** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 340.

No. 76-5329. **Castro-Ayon** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 537 F. 2d 1055.

No. 76-5330. **Edwards** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 689.

No. 76-5334. **Anderson** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76-5338. **DeVaughn** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 808.

No. 76-5339. **Terrell** *v.* **United States.** Ct. App. D. C. Certiorari denied. Reported below: 361 A. 2d 207.

No. 76-5347. **Larry** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 1149.

No. 76-5362. **Jones** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 706.

No. 76-5378. **Homcy** *v.* **United States.** Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 332, 536 F. 2d 360.

No. 76-5389. **Tilghman** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 707.

No. 76-5390. **Rushlow** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5439. **Coulter** *v.* **United States.** Ct. Cl. Certiorari denied.

No. 76-5472. **Fabricant** *v.* **California et al.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5486. **Pehler** *v.* **Schoen, Corrections Commissioner, et al.** C. A. 8th Cir. Certiorari denied. Reported below: 537 F. 2d 970.

No. 76-5487. **Buzynski** *v.* **Oliver et al.** C. A. 1st Cir. Certiorari denied. Reported below: 538 F. 2d 6.

No. 76-5488. **Barbosa** *v.* **Curry.** C. A. 5th Cir. Certiorari denied.

No. 76–5504. Locke *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 554 P. 2d 847.

No. 76–5515. Wright *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76–5519. Walsh *v.* Board of Trustees, Police Pension Fund, Article I. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 53 App. Div. 2d 559, 385 N. Y. S. 2d 1015.

No. 76–5525. Strano et al. *v.* Croy, Secretary, New Mexico Department of Hospitals and Institutions. C. A. 10th Cir. Certiorari denied.

No. 76–5529. Greenwood *v.* Superior Court of California, County of Los Angeles. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–5538. Sanders et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 695.

No. 76–5541. Higgins *v.* Metter et al. C. A. 4th Cir. Certiorari denied.

No. 76–5545. Pederson *v.* Stewart-Warner Corp. C. A. 7th Cir. Certiorari denied. Reported below: 536 F. 2d 1179.

No. 76–5618. Hancock *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76–5623. Florence *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 76–5626. Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1107.

No. 76–5627. Mancinas *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 76-5628. SAVAGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 76-5630. FELDER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76-5636. CLUCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 728.

No. 76-312. ALCAN SALES, DIVISION OF ALCAN ALUMINUM CORP. *v.* UNITED STATES. C. C. P. A. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 63 C. C. P. A. (Cust.) 83, 534 F. 2d 920.

No. 76-432. WHITE ET AL. *v.* ARTHUR MURRAY, INC. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 549 P. 2d 439.

No. 76-448. BLUE CROSS MUTUAL HOSPITAL INSURANCE, INC., ET AL. *v.* JENKINS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 538 F. 2d 164.

No. 76-5231. GIBSON *v.* GEORGIA;
No. 76-5404. ISAACS *v.* GEORGIA;
No. 76-5455. DUNGEE *v.* GEORGIA; and
No. 76-5530. STEPHENS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgments insofar as they leave undisturbed the sentences of death. See *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.,* at 231 (MARSHALL, J., dissenting). Reported below: No. 76-5231, 236 Ga. 874, 226 S. E. 2d 63; No. 76-5404, 237 Ga. 105, 226 S. E. 2d 922; No. 76-5455, 237 Ga. 218, 227 S. E. 2d 746; No. 76-5530, 237 Ga. 259, 227 S. E. 2d 261.

No. 76-463. **Sterns, Trustee in Bankruptcy** *v.* **Princeton Bank & Trust Co.** C. A. 3d Cir. Certiorari denied. Mr. Justice Brennan took no part in the consideration or decision of this petition. Reported below: 538 F. 2d 76.

No. 76-509. **Singer Co.** *v.* **Perma Research & Development Co.** C. A. 2d Cir. Motion of SCM Corp. for leave to file a brief as *amicus curiae* and certiorari denied. Reported below: 542 F. 2d 111.

*Rehearing Denied*

No. 75-1450. **Department of Social Services of Iowa et al.** *v.* **West Height Manor, Inc.**; and **Burns, Commissioner, Department of Social Services of Iowa, et al.** *v.* **Hutchison Nursing Home, Inc., et al.**, *ante,* p. 884;

No. 75-1451. **Smith** *v.* **United States**, *ante,* p. 817;

No. 75-1487. **Evans et al.** *v.* **United States**, *ante,* p. 818;

No. 75-1505. **A. W. Thompson, Inc.** *v.* **National Labor Relations Board**, *ante,* p. 818;

No. 75-1506. **Hondo Drilling Co.** *v.* **National Labor Relations Board**, *ante,* p. 818;

No. 75-1581. **Leemon** *v.* **Illinois**, *ante,* p. 804;

No. 75-1598. **Global Marine Development of California, Inc.** *v.* **National Labor Relations Board et al.**, *ante,* p. 821;

No. 75-1621. **Slovak** *v.* **Administrator, Federal Aviation Administration**, *ante,* p. 868;

No. 75-1667. **United States** *v.* **Pomponio et al.**, *ante,* p. 10;

No. 75-1743. **Doyle et al.** *v.* **Sheehan**, *ante,* p. 870;

No. 75-1815. **Gabriel** *v.* **United States et al.**, *ante,* p. 877; and

No. 75-1825. **Littrell** *v.* **United States**, *ante,* p. 831. Petitions for rehearing denied.

No. 75-1845. STRYKER ET AL. *v.* VILLAGE OF OAK PARK ET AL., *ante*, p. 832;

No. 75-1857. GABRIEL ET AL. *v.* LEVIN ET AL., *ante*, p. 833;

No. 75-1860. JHIRAD *v.* FERRANDINA, U. S. MARSHAL, *ante*, p. 833;

No. 75-6790. MUNOZ *v.* CIVIL SERVICE COMMISSION OF ILLINOIS, *ante*, p. 845;

No. 75-6861. LUNZ *v.* SMITH, CORRECTIONAL SUPERINTENDENT, *ante*, p. 849;

No. 75-6906. SMITH *v.* CALIFORNIA, *ante*, p. 851;

No. 75-6938. BLACKFORD *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 853;

No. 75-6952. REALE *v.* UNITED STATES, *ante*, p. 854;

No. 75-6984. KRANCBERG *v.* REVLON CORP., *ante*, p. 856;

No. 76-117. MITCHELL ET AL. *v.* INGRAM, COMMISSIONER OF EDUCATION OF TENNESSEE, ET AL., *ante*, p. 861;

No. 76-197. MOHASCO INDUSTRIES, INC., ET AL. *v.* SPOUND ET AL., *ante*, p. 886; and

No. 76-5026. WILSON *v.* UNITED STATES, *ante*, p. 897. Petitions for rehearing denied.

No. 75-492. ROSNER *v.* UNITED STATES, 427 U. S. 911. Petition for rehearing denied. MR. JUSTICE MARSHALL would grant petition for rehearing, vacate order denying certiorari, grant certiorari, vacate judgment, and remand case for further consideration in light of *United States* v. *Agurs*, 427 U. S. 97 (1976).

*Assignment Order*

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit from January 3, 1977, to January 7, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

## December 3, 1976

*Miscellaneous Order*

No. A-453. Gilmore *v.* Utah. State of Utah is requested to file prior to 5 p.m., e.s.t., Tuesday, December 7, 1976, a response to application for stay of execution filed December 2, 1976, particularly with respect to the allegations of said application bearing upon the validity of Gary Mark Gilmore's waiver of his right to appeal, and to file with said response, unless impossible or wholly impractical, a transcript of the hearing held on November 1, 1976, on the motion for a new trial, a transcript of the proceedings of November 10, 1976, before the Utah Supreme Court, a transcript of the proceedings before the Board of Pardons on November 30, 1976, and a transcript of the proceedings of December 1, 1976, before the sentencing judgment at which a date for execution of the sentence was set. The State's response may be filed separately from and prior to the filing of the transcripts should the State care to do so. Application for stay of execution granted pending filing of said response and further action of the Court on the application for stay. The Chief Justice, Mr. Justice Rehnquist, and Mr. Justice Stevens would deny the stay.

## December 6, 1976

*Affirmed on Appeal*

No. 76-504. Nader et al. *v.* Schaffer, Secretary of State of Connecticut, et al. Affirmed on appeal from D. C. Conn. Reported below: 417 F. Supp. 837.

*Appeals Dismissed*

No. 76-487. Bell *v.* Hopper, Warden. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 237 Ga. 189, 227 S. E. 2d 41.

No. 76-460. **Fred F. French Investing Co., Inc.** *v.* **City of New York**; and

No. 76-467. **Ramsgate Properties, Inc., et al.** *v.* **City of New York.** Appeals from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for certiorari, certiorari denied. Reported below: 39 N. Y. 2d 587, 350 N. E. 2d 381.

*Certiorari Granted—Reversed and Remanded.* (See No. 76-5403, *ante,* p. 122.)

*Certiorari Granted—Vacated and Remanded.* (See also No. 75-1536, *ante,* p. 121.)

No. 75-1875. **Pacific Legal Foundation** *v.* **Environmental Protection Agency.** C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for consideration of question of mootness. Reported below: 534 F. 2d 150.

No. 75-5831. **Williams** *v.* **United States.** C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Moody* v. *Daggett, ante,* p. 78. Reported below: 523 F. 2d 1054.

No. 76-72. **Solimine** *v.* **United States.** C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for consideration of petitioner's claim that his convictions and concurrent sentences for theft and receiving the same property must be dealt with as were the similar convictions and sentences of codefendant Sclafani. Reported below: 536 F. 2d 703.

No. 76-200. **Austin Independent School District** *v.* **United States.** C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of *Washington* v. *Davis,* 426 U. S. 229 (1976). Mr. Justice Brennan and Mr. Justice Marshall dissent because they are persuaded that the Court of Appeals correctly interpreted and applied the relevant decisions of this Court. Reported below: 532 F. 2d 380.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

I concur in the action of the Court, and agree that there would be no need to address the issue of remedy if the Court of Appeals upon reconsideration of its opinion in light of *Washington* v. *Davis,* 426 U. S. 229 (1976), should conclude that there was no constitutional violation. I would nonetheless include the issue of remedy in the remand order because of what appears to be a misapplication of a core principle of desegregation cases. In such cases, this Court has repeatedly emphasized:

> "[T]he task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'" *Milliken* v. *Bradley,* 418 U. S. 717, 738 (1974), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1971).

As suggested by this Court's remand premised upon *Washington* v. *Davis, supra,* the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.[1] That

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[1] Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, *e. g., United States* v. *Texas Education Agency,* 467 F. 2d 848, 864–869 (CA5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools:

"At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* [v. *Board of Education,* 347 U. S. 483 (1954),] as are blacks, school authorities may not court also seems to have erred in ordering a desegregation plan far exceeding in scope any identifiable violations of constitutional rights.

As is true in most of our larger cities with substantial minority populations, Austin has residential areas in which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city. Acknowledging these difficulties, the Court of Appeals noted:

> "'Countless efforts by school officials, consultants, and visiting teams have found it impossible to produce significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of massive crosstown busing incident to noncontiguous pairing of . . . schools. . . .'" *United States* v. *Texas Education Agency,* 532 F. 2d 380, 394 (CA5 1976).

The Court of Appeals then concluded that nothing short of extensive cross-town transportation would suffice.

Designed to achieve a degree of racial balance in *every* school in Austin,[2] the desegregation plan endorsed by the

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constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent." 532 F. 2d 380, 392 (CA5 1976).

[2] Apparently misconceiving the import of language in *Green* v. *County School Board,* 391 U. S. 430, 442 (1968), to the effect that there should be no "Negro" school or "white" school, the Court of Appeals seems to believe every school must be racially balanced to some degree. *Green* involved a rural, sparsely populated county with only two schools. Much of its language is irrelevant to a large urban school system. Moreover, the effect of applying the language of *Green* to such a system may be

Court of Appeals is remarkably sweeping. For kindergarten through eighth grade, the plan requires crosstown busing of all students in schools that are over 50% minority or 90% "Anglo."[3] For kindergarten through fourth grade, the students in East Austin attending the relevant schools will be bused through the congested center of the city to West Austin. For fifth through eighth grade, the flow will be reversed. The high schools will be integrated by a system of "feeder" schools. This plan requiring transportation of from 18,600 to 25,000 students, consisting of from 32% to 42% of the entire school population,[4] was ordered despite

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to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. The Solicitor General, speaking for the United States in this case, commented that "there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action." Brief for United States 8 n. 5.

[3] This "triggering" condition of the plan requires further comment. Describing it, the Court of Appeals stated as follows:

"Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as 'naturally desegregated' and would remain unchanged. *When changing demographic patterns cause any of these schools to fall outside of the 'naturally desegregated' range, the schools would be brought within the Finger Plan 4-4-4 system.*" 532 F. 2d, at 395 (emphasis added).

This aspect of the plan clearly reveals that the plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding in *Pasadena Bd. of Education* v. *Spangler*, 427 U. S. 424 (1976).

[4] In defending the high percentage of children proposed to be bused in Austin, the Court of Appeals relied on superficially comparable percentages of children that were to be transported under the plan approved in *Swann*. The school district before the Court in *Swann* included Mecklenburg County as well as the city of Charlotte. As the Court said: "The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south." 402 U. S., at 6. Although it included a metropolitan area, much of the district was rural, requiring the trans-

the District Court's conclusion that such a plan would involve a "'risk to health and probable impingement of the educational process' . . . for students younger than the sixth grade . . . ." App. to Pet. for Cert. 53.

Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation, see *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 217 (1973) (POWELL, J., concurring in part and dissenting in part), the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court.

The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences[5] are the primary determinants of residential patterns.

I do not suggest that transportation of pupils is never a

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portation of pupils quite apart from desegregative efforts. Because of this situation in *Swann*, it is unduly simplistic to compare the percentages of children bused. The situation in Austin is simply not comparable.

[5] See *Keyes*, 413 U. S., at 224–253 (POWELL, J., concurring in part and dissenting in part). The tendency of citizens of common national or ethnic origins to form homogeneous residential patterns in our cities is a familiar demographic characteristic of this country.

permissible means of implementing desegregation.[6] I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children.[7] A remedy simply is not equitable if it is disproportionate to the wrong.

No. 76–355. **Reed, Acting Chairman, U. S. Parole Commission, et al.** *v.* **Byrd et al.** C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Moody* v. *Daggett, ante,* p. 78. Reported below: 175 U. S. App. D. C. 151, 534 F. 2d 353.

No. 76–5537. **Street** *v.* **Georgia.** Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Davis* v. *Georgia, ante,* p. 122. Reported below: 237 Ga. 307, 227 S. E. 2d 750.

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[6] See *id.*, at 242–252.

[7] A related equitable principle, also applicable in fashioning a desegregation remedy, is that a court has the duty to "balanc[e] . . . the individual and collective interests." *Milliken* v. *Bradley*, 418 U. S., at 738. The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children—especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather, upon innocent children and parents.

*Miscellaneous Orders*

No. A-384. MOREAU ET AL. *v.* TONRY ET AL. Second application to vacate stay orders of the United States Court of Appeals for the Fifth Circuit, entered on November 3 and 4, 1976, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A-404. BOWLER ET UX. *v.* FEDERAL NATIONAL MORTGAGE ASSN. C. A. 6th Cir. Application for preliminary injunction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-446. WHITE *v.* TEXAS. Application for stay of execution of sentence of death imposed by the District Court of Collin County, Tex., presented to MR. JUSTICE POWELL, and by him referred to the Court, granted pending timely filing of a petition for writ of certiorari. Should petition for writ of certiorari be timely filed, then this stay is to remain in effect pending disposition of case in this Court. MR. JUSTICE REHNQUIST would deny the stay.

No. 72, Orig. SOUTH DAKOTA *v.* NEBRASKA. It is ordered that the Honorable Oren Harris, Senior Judge of the United States District Court for the Western District of Arkansas, be, and he is hereby, appointed Special Master in this case. The Special Master shall have authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses, the allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his reports, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master becomes vacant during the recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

The motion of Robert J. Foley et al. for leave to intervene is referred to the Special Master. [For earlier order herein, see *ante,* p. 810.]

No. 75-6933. BROWN *v.* OHIO. Court of Appeals of Ohio, Cuyahoga County. [Certiorari granted, *ante,* p. 893.] Motion of petitioner for appointment of counsel granted, and it is ordered that Robert Plautz, Esquire, of Cleveland, Ohio, is appointed to serve as counsel for petitioner in this case.

### *Probable Jurisdiction Noted*

No. 75-1583. MORRIS ET AL. *v.* GRESSETTE, PRESIDENT PRO TEM, SOUTH CAROLINA SENATE, ET AL. Appeal from D. C. S. C. Probable jurisdiction noted. Reported below: 425 F. Supp. 331.

### *Certiorari Granted*

No. 76-60. BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* LEVI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 175 U. S. App. D. C. 297, 535 F. 2d 1259.

No. 76-413. UNITED STATES ET AL. *v.* LARIONOFF ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 175 U. S. App. D. C. 32, 533 F. 2d 1167.

No. 76-143. SPLAWN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted limited to Questions 1, 2, 3, and 4 presented by the petition.

No. 76–444. NORTHEAST MARINE TERMINAL CO., INC., ET AL. *v.* CAPUTO ET AL.; and

No. 76–454. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* BLUNDO ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. Reported below: 544 F. 2d 35.

No. 76–545. UNITED AIRLINES, INC. *v.* McDONALD. C. A. 7th Cir. Certiorari granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 537 F. 2d 915.

*Certiorari Denied.* (See also Nos. 76–460, 76–467, and 76–487, *supra.*)

No. 75–1796. JAMES, ADMINISTRATRIX *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 962.

No. 75–1798. BERNSTEIN ET AL. *v.* UNITED STATES;

No. 75–1810. BEHAR *v.* UNITED STATES; and

No. 75–6911. CARDONA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 775.

No. 75–1864. GARMISE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 311 So. 2d 747.

No. 75–5215. GADDY *v.* MICHAEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 669.

No. 75–5594. ORR *v.* LEVI, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–6603. McDANIELS *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 75–6621. DORMAN *v.* UNITED STATES PAROLE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 335.

No. 75-6703. Reese *v.* United States Parole Commission et al. C. A. 9th Cir. Certiorari denied. Reported below: 530 F. 2d 231.

No. 75-6872. Gonzales *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 76-73. Young et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 484.

No. 76-100. Southern Railway Co. *v.* Occupational Safety and Health Review Commission et al. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 335.

No. 76-152. In re Connors. Sup. Ct. Fla. Certiorari denied. Reported below: 332 So. 2d 336.

No. 76-164. Campos *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied.

No. 76-179. Markert *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 2d 957.

No. 76-206. Conley *v.* Sawyer. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 323.

No. 76-235. Wright, Director, Department of Transportation of Hawaii *v.* Stop H-3 Assn. et al. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 434.

No. 76-292. Ashley et al. *v.* San Antonio Telephone Co., Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 694.

No. 76-306. Mitchell *v.* Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 311.

No. 76-310. Pacific Gas Transmission Co. et al. *v.* Federal Power Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 366, 536 F. 2d 393.

No. 76-335. Williams *v.* Usery, Secretary of Labor, et al. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 305.

No. 76-337. Davis *v.* United States; and

No. 76-356. Charnay *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 537 F. 2d 341.

No. 76-376. Mackey *v.* United States; and

No. 76-5237. Nelson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 316.

No. 76-381. Conley *v.* Hampton, Chairman, U. S. Civil Service Commission, et al. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 323.

No. 76-388. Niedermeyer et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 500.

No. 76-394. Timmons *v.* Lawton et al. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76-402. Albergo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 539 F. 2d 860.

No. 76-420. Russo *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 2d 1152.

No. 76-427. Groves et ux. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 1376.

No. 76-429. Gray *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 341.

No. 76-434. Phillips *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 2d 319.

No. 76-510. Liberty Mutual Insurance Co. *v.* Wetzel et al. Petition for certiorari before judgment to C. A. 3d denied.

No. 76-514. **Bell, dba Crescendo Publishing Co.** *v.* **Combined Registry Co.** C. A. 7th Cir. Certiorari denied. Reported below: 536 F. 2d 164.

No. 76-516. **Salvucci** *v.* **New York Racing Assn., Inc., et al.** C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 2d 1165.

No. 76-524. **Arms et ux.** *v.* **Watson, Trustee, et al.** Sup. Ct. Minn. Certiorari denied. Reported below: 308 Minn. 221, 243 N. W. 2d 302.

No. 76-532. **MacLaren et al.** *v.* **B-I-W Group, Inc., et al.** C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1367.

No. 76-536. **Pattison** *v.* **Spratlan.** Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. Reported below: 535 S. W. 2d 48 and 539 S. W. 2d 60.

No. 76-538. **Leitch** *v.* **Oregon Department of Revenue et al.** C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 718.

No. 76-540. **City of Chicago et al.** *v.* **Dixie Dairy Co.** C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 2d 1303.

No. 76-543. **Record Club of America, Inc.** *v.* **Columbia Broadcasting System, Inc., et al.** C. A. 3d Cir. Certiorari denied. Reported below: 539 F. 2d 704.

No. 76-547. **Simmons** *v.* **Council Bluffs Savings Bank, Executor.** Sup. Ct. Iowa. Certiorari denied. Reported below: 243 N. W. 2d 634.

No. 76-574. **Carolina Power & Light Co. et al.** *v.* **Moore.** C. A. 4th Cir. Certiorari denied. Reported below: 537 F. 2d 1252.

No. 76-578. Brannon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1385.

No. 76-588. Ruiz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 939.

No. 76-611. Fairbanks *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 541 F. 2d 862.

No. 76-631. Davis *v.* Burlington Northern, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 182.

No. 76-5082. Potts *v.* Bruce, Commissioner of Indian Affairs, et al. C. A. 10th Cir. Certiorari denied. Reported below: 533 F. 2d 527.

No. 76-5236. Morgan *v.* Massey, Correctional Superintendent. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 347.

No. 76-5241. Neal *v.* Ken-Lu Enterprises, Inc. Ct. App. N. C. Certiorari denied. Reported below: 29 N. C. App. 78, 223 S. E. 2d 831.

No. 76-5278. Hufford et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 32.

No. 76-5280. Harris *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 34 Ill. App. 3d 906, 340 N. E. 2d 327.

No. 76-5281. Hammers *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 35 Ill. App. 3d 498, 341 N. E. 2d 471.

No. 76-5299. Chandler *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 289 N. C. 616, 223 S. E. 2d 393.

No. 76-5351. Grigsby *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5355. Hayes *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5359. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5419. Haff *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5448. Woodring *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 598.

No. 76-5468. Littlefield *v.* Committee on Professional Ethics and Conduct of the Iowa State Bar Assn. Sup. Ct. Iowa. Certiorari denied. Reported below: 244 N. W. 2d 824.

No. 76-5547. Adams *v.* Power. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 323.

No. 76-5548. Edmonds *v.* Warden, Illinois State Penitentiary. C. A. 7th Cir. Certiorari denied. Reported below: 541 F. 2d 284.

No. 76-5551. Spencer *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1178.

No. 76-5552. Jackson *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5558. Manriquez *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 59 Cal. App. 3d 426, 130 Cal. Rptr. 585.

No. 76-5566. Griffin *v.* Kansas. C. A. 10th Cir. Certiorari denied.

No. 76-5568. Coleman *v.* Stone, Correctional Superintendent. C. A. 9th Cir. Certiorari denied.

No. 76-5572. Spates *v.* Connecticut. C. A. 2d Cir. Certiorari denied.

No. 76–5633. Wallace *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 707.

No. 76–5647. Davis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 743.

No. 76–5651. Lewis *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 71, 527 F. 2d 854.

No. 76–5673. Shoemaker *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 561.

No. 76–5674. Ramirez-Rodriquez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76–198. Louisiana *v.* Mora. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 330 So. 2d 900.

No. 76–254. Verit Industries et al. *v.* Ohashi. C. A. 9th Cir. Certiorari denied. Mr. Justice Stewart would grant certiorari. Reported below: 536 F. 2d 849.

No. 76–531. Arkansas Department of Labor *v.* Fairfield Communities Land Co. Sup. Ct. Ark. Certiorari denied. Mr. Justice Stewart would grant certiorari. Reported below: 260 Ark. 277, 538 S. W. 2d 698.

No. 76–488. Roanwell Corp. *v.* Plantronics, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1397.

Mr. Justice White, with whom Mr. Justice Brennan joins, dissenting.

Petitioner, the unsuccessful defendant in respondent's patent infringement suit, challenges the validity of respondent's patent on the ground that the invention was obvious to a person having ordinary skill in the art at the time of invention. The patented device is a headset used for the transmission and reception of voice communications by telephone operators, aircraft pilots, air traffic controllers, and others. The District Court found, and the record clearly demonstrates, that all of the individual elements[1] of the patented headset were used in the prior art, although no single item of the prior art used the complete combination. 403 F. Supp. 138, 142 (SDNY 1975). The court nevertheless held that the invention was not obvious on the basis of evidence showing a long unfulfilled need, prior failures in satisfying that need, and immediate acceptance and substantial commercial success. *Id.*, at 148.[2]

This Court long ago established that the *sine qua non* of patentability is "invention" and that the protection of the patent law does not extend to an "improvement [that] is the work of the skilful mechanic, not that of the inventor." *Hotchkiss* v. *Greenwood,* 11 How. 248, 267 (1851). In 1952, Congress codified this judicial standard by requiring that the improvement sought to be patented "would [not] have been obvious at the time the invention was made to a person having ordinary skill in the art." 35 U. S. C. § 103.[3]

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[1] Respondent's headset consists of a miniature microphone and miniature receiver mounted in a small capsule supported near the wearer's ear; a self-supporting, bendable, acoustic tube extending from the microphone to a point adjacent to the wearer's mouth; and a similar tube extending from the receiver and having at its outer end a plug inserted in the wearer's ear canal. The device is supported by clipping the capsule to a pair of eyeglasses or a headband or by a post-auricular housing hooking over the ear.

[2] The Court of Appeals for the Second Circuit affirmed in a short, uncritical, *per curiam* opinion. 535 F. 2d 1397 (1976).

[3] Section 103 provides in full:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

Whether referred to as "invention" or "nonobviousness" the requirement is based on the constitutional command that patents be used to "promote the Progress of . . . useful Arts." Art. I, § 8, cl. 8; *Graham* v. *John Deere Co.*, 383 U. S. 1, 5-6 (1966). Patents may not be issued to remove existing knowledge from the public domain or to limit access to materials already available.

Where, as here, the patent claim is for a combination of existing elements, "[c]ourts should scrutinize [such] claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements." *Great A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 152 (1950). When a device consists of a mere aggregation of segments of the prior art, there is an increased danger that a patent will withdraw into its monopoly what is already known and add nothing to the sum of useful knowledge. Thus, to be patentable, a combination of elements must produce something more than the sum of the pre-existing elements; there must be a synergistic result that is itself nonobvious. *Ibid. Anderson's-Black Rock* v. *Pavement Co.*, 396 U. S. 57, 61 (1969); *Sakraida* v. *Ag Pro, Inc.*, 425 U. S. 273, 282 (1976).

The District Court here made no finding that the combination produced a synergistic or any other nonobvious result. This failure is not surprising. Each element in the combination had previously been used to perform the same function it now performs in respondent's device. Although no one had used the full combination of all elements, each element had been combined with one or more of the others in a variety of different headsets. Some of the elements in respondent's invention appeared as long ago as 1878 in a British patent (Pritchett). More recently, two patented inventions used every part of respondent's combination in the same manner the parts were used by respondent. A headset patented in 1949 (Olney) employed a headband holding both a receiver and microphone, and an acoustic tube carrying the sound from the user's mouth to the microphone. Received messages, however, were heard through a flat earpiece resting on the external ear. The 1961 Guttner patent of a hearing aid perfected the concept of miniature electronic equipment mounted so as to minimize wearer discomfort. Guttner used a post-auricular housing fitting behind the external ear; the housing contained a miniature microphone and receiver connected to each other by an amplifier. A flexible acoustic tube extended from the receiver and terminated with a plug in the ear canal. Although other devices also made use of miniature electronic equipment, acoustic tubes, and ear plugs, the District Court expressly found that these two examples of the prior art contained all the necessary elements and required only slight modification to produce respondent's device:

> "Adding Olney's voice tube to Guttner's device, and modifying Guttner's electrical circuit, as also taught by Olney, so that the microphone and the receiver, instead of being connected to one another through an amplifier, are connected to separate external transmitting and receiving circuits, would produce the complete combination . . . ." 403 F. Supp., at 143.

Rather than ending its inquiry with this total lack of any nonobvious improvement over the prior art, the District Court went on to consider the need for respondent's device, prior failures in "discovering" it despite intensive efforts, and respondent's commercial success.[4] Based solely on its his-

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[4] After relating an admittedly impressive account of prior failures, the court summarized as follows:

"The record establishes that there was a long-recognized need for a lighter, more comfortable headset to eliminate the fatigue and pain, rather extravagantly termed 'ear torture,' involved in the wearing of all previously known headsets over extended periods. A number of organizations with access to the best minds in the field, including the airlines, the U. S. Air Force and FAA, as well as the industry suppliers whom they contorical review of various efforts to improve on previously existing devices, the court concluded:

> "Indeed, as simple as the invention now appears, it would seem presumptuous to the point of arrogance to conclude that it was 'obvious' to persons of ordinary skill in the art, notwithstanding their lengthy and unsuccessful struggle to achieve such results." *Id.*, at 148.

The District Judge gave no indication as to what aspect of respondent's device could be considered nonobvious to the assiduous researchers in the field.[5] Rather, he found that the requirement of nonobviousness was satisfied simply because no one had created the successful combination before respondent secured his patent. In so doing, the court departed from the clear teachings of this Court's prior cases.

Although the Court has held that need, prior failure, and commercial success may, "in a close case, tip the scales in favor of patentability," *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 279 (1944), it has consistently

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sulted, had been actively searching over a number of years for an answer to the problem, but had found none, despite the availability of all the components ultimately employed by [respondent] Larkin. When Larkin's headset was publicly disclosed, it received almost immediate recognition as an elegant and ingenious solution. It enjoyed impressive commercial success. It revolutionized thinking in the headset industry, overcoming ingrained prejudices, and its concepts have been widely copied by competitors, one of whom aptly termed it the progenitor of a 'new generation of headsets.'" 403 F. Supp., at 148.

[5] Again, the District Court's silence on this key issue is explained by the record and by the court's own findings. The court found that the Guttner device required (1) modification of its electrical circuit and (2) the addition of the Olney voice tube to produce respondent's invention. As found by the District Court, the first change was taught by Olney itself, indicating that it was neither novel nor nonobvious. The second change involved the use of an element that had served its function in numerous headsets since the Pritchett patent of 1878. It hardly requires an inventor to perceive that a hollow, voice-conducting tube on one headset can be used as a hollow voice-conducting tube on another.

and repeatedly rejected the claim that the standard of invention or nonobviousness can be satisfied solely by these "objective" criteria. *Anderson's-Black Rock, supra,* at 61; *Great A. & P. Tea Co.,* 340 U. S., at 153; *Jungersen* v. *Ostby & Barton Co.,* 335 U. S. 560, 567 (1949). In *Graham* v. *John Deere Co., supra,* we reaffirmed and refined the basic test of patentability and firmly established the role of "secondary" factors in the procedure for determining when the standard of nonobviousness is met:

> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy." 383 U. S., at 17–18.

Applying this test in *Graham,* we expressly rejected a claim that the secondary considerations could fill the void left by "exceedingly small and quite nontechnical mechanical differences in a device which was old in the art." *Id.,* at 35–36. The court below should also have rejected that same claim here.

As a general proposition, I agree that our crowded docket does not permit review of every case where error has been committed; but this case seems to me to involve such a significant departure from longstanding principles of patent law that the petition for certiorari should be granted.

No. 76–541. GRENADER ET AL. *v.* SPITZ ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 537 F. 2d 612.

No. 76-550. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* AYRES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 538 F. 2d 532.

*Rehearing Denied*

No. 75-6975. SCHREMP *v.* HALL ET AL., *ante,* p. 855;

No. 76-165. RESTAURANT INDUSTRIES CORP. ET AL. *v.* BYLICKI ET AL., *ante,* p. 891;

No. 76-186. RESTAURANT INDUSTRIES CORP. ET AL. *v.* BYLICKI ET AL., *ante,* p. 896;

No. 76-5114. IN RE K, A MINOR, BY ATCHLEY, *ante,* p. 907; and

No. 76-5376. ALERS *v.* TOLEDO ET AL., *ante,* p. 928. Petitions for rehearing denied.

## DECEMBER 8, 1976

*Probable Jurisdiction Noted*

No. 76-777. CONNOR ET AL. *v.* FINCH, GOVERNOR OF MISSISSIPPI, ET AL. D. C. S. D. Miss. Requests of Peggy J. Connor et al. and of the United States to treat application [A-421] as an expedited appeal from judgment denying injunctive relief entered by the United States District Court for the Southern District of Mississippi on November 18, 1976, granted. Probable jurisdiction noted.

Parties may file and exchange such motions under Rule 16 as they desire, and they shall file and exchange briefs on the merits on or before the close of business Monday, February 7, 1977. Responsive briefs, if any, shall be filed and exchanged on or before the close of business Monday, February 21, 1977. Oral argument set for Monday, February 28, 1977.

It is further ordered that any and all other appeals from the above judgment be taken by filing notices of appeal and perfected pursuant to the Rules of the Court by filing statements as to jurisdiction on or before the close of business Wednesday, January 5, 1977.

In all other respects, the application presented to MR. JUSTICE POWELL, and by him referred to the Court, is denied. Reported below: See 419 F. Supp. 1072 and 1089; 422 F. Supp. 1014.

### DECEMBER 13, 1976

*Dismissal Under Rule 60*

No. 76-491. HELENE CURTIS INDUSTRIES, INC., ET AL. *v.* BURKE, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60.

*Affirmed on Appeal*

No. 76-405. GABRIEL *v.* UNITED STATES ET AL.; and

No. 76-443. WESSON ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. N. J. Reported below: 416 F. Supp. 810.

*Appeals Dismissed*

No. 76-81. WINTERS *v.* COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 49 App. Div. 2d 843, 373 N. Y. S. 2d 604.

No. 76-573. FIRST AMERICAN BANK & TRUST CO. *v.* GEORGE. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 540 F. 2d 343.

No. 76-579. SPENCER ET AL., DBA TED SPENCER & SONS AUTO SERVICE CENTER *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF NANTICOKE. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction, it appearing that there is no final judgment of the highest court of a state wherein judgment could be had as required by 28 U. S. C. § 1257.

*Vacated and Remanded on Appeal*

No. 76–407. **Winters** *v.* **Lavine, Commissioner, Department of Social Services of New York, et al.** Appeal from D. C. E. D. N. Y. Judgment vacated and case remanded with directions to enter a fresh decree from which a timely appeal may be taken to the United States Court of Appeals for the Second Circuit.

*Certiorari Granted—Vacated and Remanded*

No. 76–190. **Estelle, Corrections Director** *v.* **Cole.** C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Stone* v. *Powell,* 428 U. S. 465 (1976). Reported below: 530 F. 2d 973.

*Miscellaneous Orders*

No. A–400 (76–5635). **Hannah** *v.* **Mississippi.** Sup. Ct. Miss. Application for bail, presented to Mr. Justice Brennan, and by him referred to the Court, denied.

Nos. A–403 and A–437 (76–5690). **McDonald** *v.* **Tennessee et al.** Sup. Ct. Tenn. Applications for stay and other relief, presented to Mr. Justice Marshall, and by him referred to the Court, denied.

No. A–453. **Gilmore** *v.* **Utah.** On October 7, 1976, Gary Mark Gilmore was convicted of murder and sentenced to death by a judgment entered after a jury trial in a Utah court. On December 3, 1976 [*ante*, p. 989], this Court granted an application for a stay of execution of the judgment and sentence, pending the filing here by the State of Utah of a response to the application together with transcripts of various specified hearings in the Utah courts and Board of Pardons, and until "further action of the Court on the application for stay."

The State of Utah has now filed its response and has substantially complied with the Court's request for transcripts of the specified hearings. After carefully examining the materials submitted by the State of Utah, the Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed, and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.

Accordingly, the stay of execution granted on December 3, 1976, is hereby terminated.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, concurring.

On December 2, 1976, Bessie Gilmore, claiming to act as "next friend" on behalf of her son, Gary Mark Gilmore, filed with this Court an application for a stay of execution of the death sentence then scheduled for December 6, 1976.[1] Since only a limited record was then before the Court, we granted a temporary stay of execution on December 3, 1976,[2] in order to secure a response from the State of Utah. That response was received on December 7, 1976. On December 8, 1976, a response was filed by Gary Mark Gilmore, by and through his attorneys of record, Ronald R. Stanger and Robert L. Moody, challenging the standing of Bessie Gilmore to initiate any proceedings in his behalf.

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[1] This case may be unique in the annals of the Court. Not only does Gary Mark Gilmore request no relief himself, but on the contrary he has expressly and repeatedly stated since his conviction in the Utah courts that he had received a fair trial and had been well treated by the Utah authorities. Nor does he claim to be innocent of the crime for which he was convicted. Indeed, his only complaint against Utah or its judicial process, including that raised in the state habeas corpus petition mentioned in n. 4, *infra*, has been with respect to the delay on the part of the State in carrying out the sentence.

[2] THE CHIEF JUSTICE, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS dissented from issuance of the stay.

When the application for a stay was initially filed on December 2, a serious question was presented as to whether Bessie Gilmore had standing to seek the requested relief or any relief from this Court. Assuming the Court would otherwise have jurisdiction with respect to a "next friend" application, that jurisdiction would arise only if it were demonstrated that Gary Mark Gilmore is unable to seek relief in his own behalf. See *Rosenberg* v. *United States*, 346 U. S. 273, 291 (1953) (separate opinion of Jackson, J., joined by five Members of the Court). However, in view of Gary Mark Gilmore's response on December 8, 1976, it is now clear that the "next friend" concept is wholly inapplicable to this case. Since Gary Mark Gilmore has now filed a response and appeared in his own behalf, through his retained attorneys, any basis for the standing of Bessie Gilmore to seek relief in his behalf is necessarily eliminated. The only possible exception to this conclusion would be if the record suggested, despite the representations of Gary Mark Gilmore's attorneys, that he was incompetent to waive his right of appeal under state law and was at the present time incompetent to assert rights or to challenge Bessie Gilmore's standing to assert rights in his behalf as "next friend."[3]

After examining with care the pertinent portions of the transcripts and reports of state proceedings, and the response of Gary Mark Gilmore filed on December 8, I am in complete agreement with the conclusion expressed in the Court's order that Gary Mark Gilmore knowingly and intelligently, with full knowledge of his right to seek an appeal in the Utah Supreme Court, has waived that right.[4] I further agree that the State's determinations of his competence to waive his rights knowingly and intelligently were firmly grounded.[5]

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[3] When Bessie Gilmore's application for a stay first came before the Court, we did not have before us for consideration transcripts of the various hearings at which Gary Mark Gilmore was said to have waived his federal constitutional rights. As today's order makes clear, each Justice has now had an opportunity to review the relevant transcripts and reports concerning mental competence and waiver.

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[4] At a hearing on November 1, 1976, on a motion for a new trial, Gilmore's attorneys informed the trial court that they had been told by Gilmore not to file an appeal and not to seek a stay of execution of sentence on his behalf. They also informed the trial court that they had advised Gilmore of his right to appeal, that they believed there were substantial grounds for appeal, that the constitutionality of the Utah death penalty statute had not yet been reviewed by either the Utah Supreme Court or the United States Supreme Court, and that in their view there was a chance that the statute would eventually be held unconstitutional. The trial court itself advised Gilmore that he had a right to appeal, that the constitutional issue had not yet been resolved, and that both counsel for the State and Gilmore's own counsel would attempt to expedite an appeal to avoid unnecessary delay. Gilmore stated that he did not "care to languish in prison for another day," that the decision was his own, and that he had not made the decision as a result of the influence of drugs or alcohol or as a result of the way he was treated in prison. On November 4, the state trial court concluded that Gilmore fully understood his right to appeal and the consequences of a decision not to appeal.

On November 10, the Utah Supreme Court held a hearing on the Utah Attorney General's motion to vacate a stay of execution of sentence entered two days earlier by that court. Gilmore was present, and, in response to questions from several justices, stated that he thought he had received a fair trial and a proper sentence, that he opposed any appeal in the case, and that he wished to withdraw an appeal previously filed without his consent by appointed trial counsel.

Finally, at a hearing before the trial court on December 1, Gilmore again informed the court that he opposed all appeals that had been filed.

[5] In the pretrial period, from August 6 to October 6, 1976, the trial court appointed psychiatrists to examine Gilmore on two occasions, to determine his competency to stand trial and his sanity at the time of the offense. Three of the five psychiatrists who examined Gilmore in that period found no evidence of mental illness or insanity. The record before us does not include the findings of the other two psychiatrists,

When the record establishing a knowing and intelligent waiver of Gary Mark Gilmore's right to seek appellate review is combined with the December 8 written response submitted to this Court,[*] it is plain that the Court is without jurisdiction to entertain the "next friend" application filed by Bessie Gilmore. This Court has jurisdiction pursuant to Art. III of the Constitution only over "cases and controversies," and we can issue stays only in aid of our jurisdiction. 28 U. S. C. §§ 1651, 2101 (f). There is no dispute, presently before us, between Gary Mark Gilmore and the State of Utah, and the application of Bessie Gilmore manifestly

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which were presented to the trial court when it concluded that Gilmore was sane for the purpose of standing trial.

After trial, at the November 1 hearing, the state trial court ordered *sua sponte* that the Utah State Prison Psychiatrist, or other available psychiatric personnel of the prison, examine Gilmore to determine his ability to decide not to appeal. In the order, the court noted that Gilmore had instructed his attorneys not to appeal after they had informed him that there was substantial legal merit to such an appeal. On November 3 the Prison Psychiatrist submitted a report, based on a one-hour psychiatric interview and a review of Gilmore's medical records, concluding that Gilmore's decision to waive appeal was the "product of an organized thought process" and that Gilmore had not "become 'insane' or mentally ill." On the same day, two prison psychologists submitted a second report, based on psychological tests and an individual interview, concluding that "[Gilmore] presently has the mental capacity and emotional stability to make the necessary decisions concerning his sentence and to understand the consequences."

Gilmore apparently attempted to take his own life on November 16. The Prison Psychiatrist subsequently reported to the Board of Pardons that Gilmore's mental state on November 24 was "exactly as described" in the psychiatrist's report to the court on November 3.

[*] On December 8, 1976, Gilmore, by counsel, advised this Court of the filing of a petition in a Utah state court seeking habeas corpus relief. Although that petition is not in the papers before us, it is understood that the ground relied upon is not the deprivation of any constitutional right but that there is a 60-day limitation under Utah law upon the carrying out of the sentence of death, an issue which has not been presented to the Utah Supreme Court as of this date.

fails to meet the statutory requirements to invoke this Court's power to review the action of the Supreme Court of Utah. No authority to the contrary has been brought to our attention, and nothing suggested in dissent bears on the threshold question of jurisdiction.

In his dissenting opinion, Mr. Justice White suggests that Gary Mark Gilmore is "unable" as a matter of law to waive the right to state appellate review.[7] Whatever may be said as to the merits of this suggestion, the question simply is not before us. Gilmore, duly found to be competent by the Utah courts, has had available meaningful access to this Court and has declined expressly to assert any claim here other than his explicit repudiation of Bessie Gilmore's effort to speak for him as next friend. It follows, therefore, that the Court is without jurisdiction to consider the question posed by the dissent.

Mr. Justice Stevens, with whom Mr. Justice Rehnquist joins, concurring.

In my judgment the record not only supports the conclusion that Gilmore was competent to waive his right to appeal, but also makes it clear that his access to the courts is entirely unimpeded and therefore a third party has no standing to litigate an Eighth Amendment claim—or indeed any other claim—on his behalf. Without a proper litigant before it, this Court is without power to stay the execution.

Mr. Justice White, joined by Mr. Justice Brennan and Mr. Justice Marshall, dissenting.

As Justice Wilkins said in dissent below,[1] there are substantial questions under *Furman* v. *Georgia*, 408 U. S. 238 (1972), about the constitutionality of the Utah death penalty statute. Because of Gary Gilmore's purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts. I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.[2] Until the state courts have resolved the obvious, serious doubts about the validity of the state statute, the imposition of the death penalty in this case should be stayed.

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[7] Mr. Justice White's dissent expresses the view that absent an affirmative decision by "the state courts" as to the validity of Utah's capital punishment statute, "the imposition of the death penalty in this case should be stayed." However, Gilmore has not challenged the validity of the statute under which he was convicted, and there is no other party before this Court with requisite standing to do so.

[1] Prior to Gilmore's seeming waiver, the trial judge also appeared ready

Given the inability of Gary Gilmore to waive resolution in the state courts of the serious questions concerning the constitutional legality of his death sentence, there is no jurisdictional barrier to addressing the question upon the application of the defendant's mother. See *Rosenberg* v. *United States*, 346 U. S. 273, 291 (1953) (separate opinion of Jackson, J.). Without examining the constitutionality of the Utah death statute, on November 10, 1976, the Utah Supreme Court vacated its stay of Gilmore's sentence and dismissed the appeal which his then attorneys had filed on his behalf.

Pending the filing of a timely petition for certiorari, I would continue the stay previously issued by this Court; and upon said filing it would appear that the judgment of the Supreme Court of Utah should be vacated and the case remanded to the state courts for reconsideration in the light of the death penalty decisions announced by this Court

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to certify an appeal in order that the State Supreme Court could pass on the issue of the validity of the death penalty statute, an issue he had not himself addressed.

[2] Nor in the absence of a state-court decision sustaining the death penalty statute would a purported waiver of the Eighth Amendment necessarily be a defense to a wrongful-death action, see Utah Code Ann. § 78-11-7 (1953), based on an execution imposed under an unconstitutional statute.

last Term. Cf. *Collins* v. *Arkansas, ante,* p. 808; *Neal* v. *Arkansas, ante,* p. 808.

MR. JUSTICE MARSHALL, dissenting.

I fully agree with my Brother WHITE that a criminal defendant has no power to agree to be executed under an unconstitutional statute. I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments. Irrespective of this, however, I cannot agree with the view expressed by THE CHIEF JUSTICE that Gilmore has competently, knowingly, and intelligently decided to let himself be killed. Less than five months have passed since the commission of the crime; just over two months have elapsed since sentence was imposed. That is hardly sufficient time for mature consideration of the question, nor does Gilmore's erratic behavior—from his suicide attempt to his state habeas petition—evidence such deliberation. No adversary hearing has been held to examine the experts,[1] all employed by the State of Utah, who have pronounced Gilmore sane.[2] The decision of the Utah Supreme Court finding a valid waiver can be given little weight. In the transcripts that the court prepared for us, it omitted a portion of its proceedings as having "no pertinency" to the issue of Gilmore's "having voluntarily and intelligently waived his right to appeal." That "irrelevant" portion involved a discussion by Gilmore's trial counsel of his opinion of Gilmore's competence and the constitutionality of the Utah statute. It is appalling that any court could consider these questions irrelevant to that determination. It is equally shocking that the Utah court, in a matter of such importance, failed even to have a court reporter present to transcribe the proceeding, instead relying on recordings made by dictating machines which have produced a partly unintelligible record. These inexplicable actions by a court charged with life or death responsibility underscore the failure of the State to determine adequately the validity of Gilmore's purported waiver and the propriety of imposing capital punishment.

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[1] If Gilmore's own lawyers refused to question his competence, the court could certainly ask other counsel acting as *amicus curiae* to present that side of the issue.

[2] As THE CHIEF JUSTICE notes, the opinion of the Prison Psychiatrist, the only doctor who has considered Gilmore's competency since the waiver decision was publicly announced, was based on a review of Gilmore's medical records and a *one-hour* interview.

MR. JUSTICE BLACKMUN, dissenting.

I am of the view that the question of Bessie Gilmore's standing and the constitutional issue are not insubstantial, and, indeed, in the context of this case, are of manifest importance. I therefore would have the pending application set for expeditious hearing and given plenary, not summary, consideration. See Mr. Justice Harlan's haunting admonition, which I joined, in *New York Times Co.* v. *United States*, 403 U. S. 713, 752, 755 (1971) (Harlan, J., dissenting).

No. 76-948. LEIB ET AL. *v.* TWENTIETH CENTURY CORP. ET AL. C. A. 3d Cir. Motion of petitioners to dispense with printing petition and appendix and to impound to preserve confidentiality denied.

No. 75-657. LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL. *v.* USERY, SECRETARY OF LABOR. C. A. 7th Cir. [Certiorari granted, 424 U. S. 907.] Motion of petitioners for leave to file supplemental brief after argument granted.

No. 75-1707. OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. *v.* HODORY. Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, ante, p. 814.] Motions of Republic Steel Corp. and United States Steel Corp. for leave to file briefs as *amici curiae* granted.

No. 75-1775. MASSACHUSETTS *v.* WESTCOTT. Sup. Ct. Jud. Mass. [Certiorari granted, *ante,* p. 815] Motion of S. Stephen Rosenfeld, Esquire, to permit Howard Whitehead, Esquire, to argue *pro hac vice* on behalf of petitioner granted.

No. 76-167. UNITED STATES *v.* RAMSEY ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 815.] Joint motion of respondents to strike petitioner's brief on the merits denied.

No. 76-180. SMITH, ADMINISTRATOR, HUMAN RESOURCES ADMINISTRATION OF NEW YORK CITY, ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM ET AL.;

No. 76-183. SHAPIRO, EXECUTIVE DIRECTOR, NEW YORK STATE BOARD OF SOCIAL WELFARE, ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM ET AL.;

No. 76-5193. RODRIGUEZ ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM ET AL.; and

No. 76-5200. GANDY ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante,* p. 883.] Motion of Puerto Rican Family Institute, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 76-316. BATES ET AL. *v.* STATE BAR OF ARIZONA. Appeal from Sup. Ct. Ariz. [Probable jurisdiction noted, *ante,* p. 813.] Motion of the State of North Carolina et al. for leave to present oral argument as *amici curiae* denied.

No. 76-5358. HENRY *v.* FLORIDA, *ante,* p. 951. Counsel for respondent requested to file a response to petition for rehearing within 30 days.

No. 76-5697. JACKSON *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 76-422. Dothard, Director, Department of Public Safety of Alabama, et al. *v.* Rawlinson et al. Appeal from D. C. M. D. Ala. [Probable jurisdiction noted, *ante,* p. 976.] Motion of Walter S. Turner, Esquire, to permit G. Daniel Evans, Esquire, to argue *pro hac vice* on behalf of appellants granted. Motion of Morris Dees, Esquire, to permit Pamela S. Horowitz to argue *pro hac vice* on behalf of appellees granted.

*Certiorari Granted*

No. 76-99. Occidental Life Insurance Company of California *v.* Equal Employment Opportunity Commission. C. A. 9th Cir. Certiorari granted. Reported below: 535 F. 2d 533.

*Certiorari Denied.* (See also Nos. 76-81 and 76-573, *supra.*)

No. 75-6971. Sladek *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 975.

No. 76-153. Kelner *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 1020.

No. 76-228. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local No. 705, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* National Labor Relations Board et al. C. A. 7th Cir. Certiorari denied. Reported below: 532 F. 2d 1169.

No. 76-289. Brasel *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 538 S. W. 2d 325.

No. 76-290. American Civil Liberties Union et al. *v.* Bozardt et al. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 340.

No. 76-315. Wisconsin Valley Trust Co. et al., Co-executors *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 2d 730.

No. 76–361. D. I. Z. Livestock Co. et al. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 708, 538 F. 2d 348.

No. 76–365. Sloan et al. *v.* Securities and Exchange Commission et al. C. A. 2d Cir. Certiorari denied.

No. 76–367. Faulkner *v.* United States;
No. 76–369. Wells *v.* United States; and
No. 76–5354. McClanahan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 724.

No. 76–435. F. W. Woolworth Co. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1245.

No. 76–438. Lipkowitz et al., Executors *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 539 F. 2d 878.

No. 76–442. United States Fidelity & Guaranty Co. *v.* Equal Employment Opportunity Commission. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 324.

No. 76–452. Key et al. *v.* Keady, U. S. District Judge, et al. C. A. 5th Cir. Certiorari denied.

No. 76–453. New Hampshire *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 539 F. 2d 277.

No. 76–455. Gillis *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76–456. O'Looney *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 385.

No. 76–464. Shreiber et al. *v.* United Industrial Corp. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 51 App. Div. 2d 688, 379 N. Y. S. 2d 404.

No. 76-482. Ramirez *v.* United States. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 537, 538 F. 2d 888.

No. 76-544. Neff Trailer Sales, Inc. *v.* Strickler, Administratrix. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 890.

No. 76-562. Roberts *v.* American Bank of Muskogee et al. C. A. 10th Cir. Certiorari denied.

No. 76-618. Martin et al. *v.* Continental Grain Co. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 592.

No. 76-668. Molever et al. *v.* Levenson et al. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 996.

No. 76-704. Young *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 415.

No. 76-5184. Baylor *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 360 A. 2d 42.

No. 76-5192. Phillips *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 586.

No. 76-5199. Foster *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5213. Thornton *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 357 A. 2d 429.

No. 76-5227. Evers *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1186.

No. 76-5238. Banks *v.* United States; and

No. 76-5239. LaPointe *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: No. 76-5238, 539 F. 2d 14; No. 76-5239, 539 F. 2d 719.

No. 76-5257. Mayfield *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-5304. Sellars *v.* California et al. Sup. Ct. Cal. Certiorari denied.

No. 76-5348. Spates *v.* Vollero et al. C. A. 2d Cir. Certiorari denied.

No. 76-5361. Hammond *v.* Bailar, Postmaster General. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1385.

No. 76-5364. Tesack *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 1068.

No. 76-5383. Childress *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 706.

No. 76-5388. Jones *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5396. Mahone *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 2d 922.

No. 76-5397. Standing Soldier *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 196.

No. 76-5406. Love *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 898.

No. 76-5411. Gonzalez-Hernandez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5413. Walton *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 1348.

No. 76-5440. Johnson *v.* United States; and
No. 76-5553. Gunn *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 2d 954.

No. 76-5441. Robison *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76–5444. **Demars** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76–5500. **Rodriguez** *v.* **New York.** App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 2d 781, 383 N. Y. S. 2d 17.

No. 76–5508. **Ray** *v.* **Rose, Warden.** C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 966.

No. 76–5576. **Pearcy** *v.* **California.** Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–5584. **Clark** *v.* **Leach et al.** C. A. 10th Cir. Certiorari denied.

No. 76–5586. **Flannery** *v.* **Pennsylvania;** and
No. 76–5588. **Bonaduce** *v.* **Pennsylvania.** Super. Ct. Pa. Certiorari denied.

No. 76–5595. **Casteel** *v.* **California.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–5601. **Fisher** *v.* **Pennsylvania.** Pa. Commw. Ct. Certiorari denied. Reported below: 23 Pa. Commw. 25, 350 A. 2d 428.

No. 76–5604. **Johnson** *v.* **Alabama.** Ct. Crim. App. Ala. Certiorari denied. Reported below: 335 So. 2d 663.

No. 76–5605. **Sterling** *v.* **Wyrick, Warden.** C. A. 8th Cir. Certiorari denied.

No. 76–5665. **Blewitt** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 1099.

No. 76–5677. **Jones** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 1177.

No. 76–5689. **Brown** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Reported below: 541 F. 2d 858.

No. 76-5694. Ohrynowicz *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 542 F. 2d 715.

No. 76-5711. Yanez-Osorio *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1181.

No. 76-5712. Smith *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 1177.

No. 75-5718. LaBare *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 926.

No. 76-283. Bute et al. *v.* Quinn et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 535 F. 2d 1258.

No. 76-331. North Carolina Utilities Commission et al. *v.* Federal Communications Commission et al.;

No. 76-332. American Telephone & Telegraph Co. et al. *v.* Federal Communications Commission et al.; and

No. 76-336. National Association of Regulatory Utility Commissioners *v.* Federal Communications Commission et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of these petitions. Reported below: 537 F. 2d 787.

No. 76-339. Cousins *v.* Maryland. Ct. App. Md. Certiorari denied. Reported below: 277 Md. 383, 354 A. 2d 825.

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

Petitioner was charged in an information and an indictment with alleged crimes arising from an incident that occurred at a department store in Montgomery County, Md. The information charged assault upon two store detectives who had attempted to apprehend him after following him from the store into an adjacent shopping mall area. The subsequent indictment charged an assault upon only one of the detectives. On the basis of the information, petitioner was tried first at a bench trial in state court for the assault upon the officer not named in the indictment. He was acquitted. Thereafter, petitioner made a motion to dismiss the indictment on grounds of collateral estoppel and double jeopardy. The trial court denied the motion, and the Court of Appeals of Maryland affirmed. 277 Md. 383, 354 A. 2d 825 (1976).

I would grant the petition for certiorari and reverse the judgment of the Court of Appeals affirming the denial of the motion to dismiss the indictment. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453-454 (1970) (BRENNAN, J., concurring). See *Dempsey* v. *United States,* 423 U. S. 1079 (1976) (BRENNAN, J., dissenting); *Susi* v. *Flowers,* 423 U. S. 1006 (1975) (BRENNAN, J., dissenting); *Vardas* v. *Texas,* 423 U. S. 904 (1975) (BRENNAN, J., dissenting); *Stewart* v. *Iowa,* 423 U. S. 902 (1975) (BRENNAN, J., dissenting); *Waugh* v. *Gray,* 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri,* 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson,* 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico,* 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States,* 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory,* 66 N. J. 510, 333 A. 2d 257 (1975).

No. 76-549. Skil Corp. *v.* Millers Falls Co. et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 541 F. 2d 554.

No. 76-559. Division 241, Amalgamated Transit Union (AFL-CIO) *v.* Suscy et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 538 F. 2d 1264.

No. 76-551. Americans United et al. *v.* Rogers et al. Sup. Ct. Mo. Certiorari denied. Mr. Justice Brennan would grant certiorari. Reported below: 538 S. W. 2d 711.

No. 76-552. Whitlow *v.* Hodges, Director, Division of Driver Licensing, Department of Public Safety of Kentucky. C. A. 6th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice Marshall would grant certiorari. Reported below: 539 F. 2d 582.

No. 76-5544. Birt *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Mr. Justice Brennan and Mr. Justice Marshall would grant certiorari and vacate judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (Brennan, J., dissenting); *id.,* at 231 (Marshall, J., dissenting). Reported below: 236 Ga. 815, 225 S. E. 2d 248.

*Rehearing Denied*

No. 75-1681. Miller *v.* Stag Oil Producers, Inc., *ante,* p. 825. Petition for rehearing denied.

December 17, 1976

*Miscellaneous Order*

No. A-488. Kearns-Tribune Corp., dba Salt Lake Tribune *v.* Utah Board of Corrections et al. C. A. 10th Cir.

Application for stay of judgment entered December 7, 1976, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant stay.

*Rehearing Denied*

No. A-453. GILMORE *v.* UTAH, *ante,* p. 1012. Petition for rehearing denied.

### DECEMBER 21, 1976

*Dismissals Under Rule 60*

No. 76-263. HOPI TRIBE *v.* UNITED STATES ET AL. Ct. Cl. Certiorari dismissed under this Court's Rule 60. Reported below: 207 Ct. Cl. 968, 529 F. 2d 533.

No. 76-714. OLD ELK *v.* DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF MONTANA ET AL. Appeal from Sup. Ct. Mont. dismissed under this Court's Rule 60. Reported below: 170 Mont. 208, 552 P. 2d 1394.

### DECEMBER 28, 1976

*Dismissal Under Rule 60*

No. 76-685. M & T CHEMICALS, INC. *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 542 F. 2d 1165.

### JANUARY 10, 1977

*Affirmed on Appeal*

No. 75-1532. HECHINGER ET AL. *v.* MARTIN, CHAIRMAN, DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, ET AL. Affirmed on appeal from D. C. D. C. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 411 F. Supp. 650.

No. 75–1817. **Lefkowitz, Attorney General of New York** *v.* **C. D. R. Enterprises, Ltd., et al.** Affirmed on appeal from D. C. E. D. N. Y. Mr. Justice White and Mr. Justice Rehnquist would note probable jurisdiction and set case for oral argument. Reported below: 412 F. Supp. 1164.

*Vacated and Remanded on Appeal*

No. 74–1522. **Colón, Governor of Puerto Rico, et al.** *v.* **Ortiz et al.** Appeal from D. C. Puerto Rico. Judgment vacated and case remanded for consideration of whether cause is moot. Reported below: See 385 F. Supp. 111.

*Appeals Dismissed*

No. 76–602. **Gurs** *v.* **Gurs.** Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–614. **Firth** *v.* **Thompson et al., Justices of Supreme Court of Nevada.** Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–642. **Chasteen** *v.* **Oklahoma.** Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 551 P. 2d 1171.

No. 76–696. **Powell Manufacturing Co., Inc.** *v.* **Harrington Manufacturing Co., Inc.** Appeal from Sup. Ct. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 290 N. C. 662, 228 S. E. 2d 454.

No. 76-673. CAZARES ET AL. *v.* INDIANA ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 539 F. 2d 715.

No. 76-5414. POWELL *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-5484. IN RE ADOPTION OF R. I. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 468 Pa. 207, 361 A. 2d 294.

No. 76-5620. ESLINGER *v.* BATES, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-5767. SMEEKENS *v.* MICHIGAN STATE BAR GRIEVANCE BOARD. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for certiorari, certiorari denied. Reported below: 396 Mich. 719, 242 N. W. 2d 391.

No. 76-627. CABLE-VISION, INC., ET AL. *v.* FREEMAN ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 336 So. 2d 1180.

No. 76-660. HUMANE SOCIETY OF THE UNITED STATES, NEW JERSEY BRANCH, INC., ET AL. *v.* NEW JERSEY FISH AND GAME COUNCIL ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 70 N. J. 565, 362 A. 2d 20.

No. 76-5617. **Chapdelaine** *v.* **Tennessee State Board of Examiners for Land Surveyors et al.** Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 541 S. W. 2d 786.

*Certiorari Granted—Vacated and Remanded*

No. 74-1601. **American Telephone & Telegraph Co., Long Lines Department** *v.* **Communications Workers of America, AFL-CIO, et al.** C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *General Electric Co.* v. *Gilbert, ante,* p. 125. Reported below: 513 F. 2d 1024.

No. 75-70. **Social Service Employees Union, Local 371, et al.** *v.* **Women in City Government United et al.**; and

No. 75-71. **United Federation of Teachers et al.** *v.* **Women in City Government United et al.** C. A. 2d Cir. Certiorari granted and cases remanded for further consideration in light of *General Electric Co.* v. *Gilbert, ante,* p. 125.

No. 75-568. **Lake Oswego School District No. 7 et al.** *v.* **Hutchison.** C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *General Electric Co.* v. *Gilbert, ante,* p. 125. Reported below: 519 F. 2d 961.

No. 75-1419. **McDonald, aka MacDonald** *v.* **United States.** C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded to consider merits of petitioner's appeal. The Chief Justice, Mr. Justice White, and Mr. Justice Rehnquist dissent.

No. 75-1887. **Jones et al.** *v.* **Carroll et al.** C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Meachum* v. *Fano,* 427 U. S. 215 (1976), and *Montanye* v. *Haymes,* 427 U. S. 236 (1976). Reported below: 540 F. 2d 670.

No. 75–1459. SINGER *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of the position now asserted by the Solicitor General in his memorandum filed on behalf of the United States Civil Service Commission. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 530 F. 2d 247.

No. 75–1884. CROUCHER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. On representation of the Solicitor General set forth in his memorandum for the United States, filed December 2, 1976, judgment vacated and case remanded for reconsideration in light of position presently asserted by the Government. In all other respects certiorari denied. Reported below: 525 F. 2d 943.

No. 75–7005. WATKINS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. On representation of the Solicitor General set forth in his supplemental memorandum for the United States, filed November 24, 1976, judgment vacated and case remanded for reconsideration in light of position presently asserted by the Government. Reported below: 533 F. 2d 1134.

No. 76–5146. RUDOLPH *v.* WISCONSIN. Sup. Ct. Wis. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Doyle* v. *Ohio*, 426 U. S. 610 (1976). Reported below: 71 Wis. 2d 845, 240 N. W. 2d 430.

*Miscellaneous Orders*

No. A–436. GAYLORD *v.* UNITED STATES. C. A. 7th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A-456 (76-930). Evans, Governor of Washington, et al. *v.* Atlantic Richfield Co. et al. Appeal from D. C. W. D. Wash. Application for stay of order of permanent injunction entered by the United States District Court for the Western District of Washington granted pending final disposition of appeal in this Court.

No. A-458. Ward *v.* United States. C. A. 5th Cir. Application for bail, presented to Mr. Justice Marshall, and by him referred to the Court, denied.

No. D-62. In re Disbarment of Persky. Robert S. Persky, of New York, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on November 1, 1976 [*ante,* p. 913], is hereby discharged.

No. D-94. In re Disbarment of Esber. It is ordered that Edward M. Esber, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-95. In re Disbarment of Ohralik. It is ordered that Albert Ohralik, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75-1261. Knebel, Secretary of Agriculture *v.* Hein et al.; and

No. 75-1355. Burns, Commissioner, Department of Social Services of Iowa, et al. *v.* Hein et al. Appeals from D. C. S. D. Iowa. [Probable jurisdiction noted, 426 U. S. 904.] Motion of appellee Hein for leave to file supplemental memorandum after argument granted.

No. 75-562. **Rosebud Sioux Tribe** *v.* **Kneip, Governor of South Dakota, et al.** C. A. 8th Cir. [Certiorari granted, 425 U. S. 989.] Motion of the Solicitor General to permit H. Bartow Farr, Esquire, to present oral argument *pro hac vice* granted.

No. 75-909. **Environmental Protection Agency** *v.* **Brown, Governor of California, et al.**; and **Environmental Protection Agency** *v.* **Arizona et al.** C. A. 9th Cir.;

No. 75-960. **Environmental Protection Agency** *v.* **Maryland et al.** C. A. 4th Cir.;

No. 75-1050. **Virginia ex rel. Air Pollution Control Board** *v.* **Train, Administrator, Environmental Protection Agency**; and

No. 75-1055. **Train, Administrator, Environmental Protection Agency** *v.* **District of Columbia et al.** C. A. D. C. Cir. [Certiorari granted, 426 U. S. 904.] Motion of Pacific Legal Foundation for leave to participate in oral argument as *amicus curiae* denied.

No. 76-316. **Bates et al.** *v.* **State Bar of Arizona.** Appeal from Sup. Ct. Ariz. [Probable jurisdiction noted, *ante,* p. 813.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 20 minutes allotted for that purpose. Both appellants and appellee granted 10 additional minutes for oral argument. Motion of Magar E. Magar for leave to file a brief *pro se* as *amicus curiae* denied.

No. 76-5382. **Darden** *v.* **Florida.** Sup. Ct. Fla. Certiorari granted November 1, 1976 [*ante,* p. 917], limited to Question 1 presented by the petition, dealing with whether the prosecution's summation to jury in the circumstances of this case deprived petitioner of due process of law.

No. 76-5598. **Sayles** *v.* **McGuire, U. S. District Judge.** Motion for leave to file petition for writ of mandamus denied.

*Probable Jurisdiction Noted*

No. 76-352. **Chapelle** *v.* **Greater Baton Rouge Airport District et al.** Appeal from Ct. App. La., 1st Cir. Probable jurisdiction noted. Reported below: 329 So. 2d 810.

No. 76-415. **Ward** *v.* **Illinois.** Appeal from Sup. Ct. Ill. Probable jurisdiction noted. Reported below: 63 Ill. 2d 437, 349 N. E. 2d 47.

No. 76-496. **Wolman et al.** *v.* **Essex et al.** Appeal from D. C. S. D. Ohio. Probable jurisdiction noted. Reported below: 417 F. Supp. 1113.

*Certiorari Granted*

No. 76-255. **Hazelwood School District et al.** *v.* **United States.** C. A. 8th Cir. Certiorari granted. Reported below: 534 F. 2d 805.

No. 76-577. **Zacchini** *v.* **Scripps-Howard Broadcasting Co.** Sup. Ct. Ohio. Certiorari granted. Reported below: 47 Ohio St. 2d 224, 351 N. E. 2d 454.

No. 76-674. **Third National Bank in Nashville** *v.* **Impac Limited, Inc., et al.** Sup. Ct. Tenn. Certiorari granted. Reported below: 541 S. W. 2d 139.

No. 76-451. **Alabama Power Co.** *v.* **Davis.** C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 542 F. 2d 650.

No. 76-5187. **Lee** *v.* **United States.** C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 539 F. 2d 612.

*Certiorari Denied.* (See also Nos. 76-602, 76-614, 76-642, 76-673, 76-696, 76-5414, 76-5484, 76-5620, and 76-5767, *supra.*)

No. 75-1049. **Hutchison** *v.* **Lake Oswego School District No. 7 et al.** C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 961.

No. 75–1674. Kings County et al. *v.* Santa Rosa Band of Indians et al. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 655.

No. 75–7003. Scherer *v.* Pogue, Warden. C. A. 9th Cir. Certiorari denied.

No. 76–158. Valentine et al. *v.* United States;
No. 76–159. Diaco *v.* United States; and
No. 76–334. Dansker et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 537 F. 2d 40.

No. 76–174. Mead Johnson & Co. *v.* Goodman, Executor. C. A. 3d Cir. Certiorari denied. Reported below: 534 F. 2d 566.

No. 76–177. Lupo *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 972.

No. 76–245. Hurley *v.* United States;
No. 76–252. DiMuro et al. *v.* United States;
No. 76–5125. Doherty *v.* United States; and
No. 76–5242. Lung et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 2d 503.

No. 76–259. Gillion *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 38 Ill. App. 3d 261, 344 N. E. 2d 796.

No. 76–264. Swisher *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 544 S. W. 2d 379.

No. 76–276. Hillstrom et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 209.

No. 76–279. Marzano *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 2d 257.

No. 76–288. Heyman, Trustee *v.* Department of Revenue of Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 533 F. 2d 1020.

No. 76-323. Wingate et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 699.

No. 76-326. Hinshaw *v.* Superior Court of California, County of Orange. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-327. Weinstein *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 344.

No. 76-343. Jones *v.* United States et al. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 269.

No. 76-349. Garmany *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76-353. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 706.

No. 76-399. Crumpler *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1063.

No. 76-406. Napoli *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 2d 104.

No. 76-410. Union Nacional de Trabajadores et al. *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 2d 1.

No. 76-412. Potito et ux. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 49.

No. 76-462. Pellicci *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 542 F. 2d 1163.

No. 76-481. Duke City Lumber Co. et al. *v.* Knebel, Secretary of Agriculture, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 218, 539 F. 2d 220.

No. 76-497. TAXE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 2d 961.

No. 76-502. BENNETT *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 240, 539 F. 2d 242.

No. 76-506. A ET AL. *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 191 Colo. 10, 550 P. 2d 315.

No. 76-513. INTERNATIONAL RECTIFIER CORP. ET AL. *v.* PFIZER, INC. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 180.

No. 76-517. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 2d 990.

No. 76-519. IADAROLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76-535. JONES ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 225.

No. 76-546. SHARP *v.* FEDERAL DEPOSIT INSURANCE CORP. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 241, 539 F. 2d 243.

No. 76-556. BRINKE TRANSPORTATION CORP. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Certiorari denied.

No. 76-557. KHOURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 441.

No. 76-560. SPITZER AKRON, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 540 F. 2d 841.

No. 76-563. CANADIAN PARKHILL PIPE STRINGING, LTD., ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 540 F. 2d 258.

No. 76-564. Markham *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 187.

No. 76-566. Iaconetti *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 540 F. 2d 574.

No. 76-569. New York Shipping Assn., Inc. *v.* National Labor Relations Board et al.; and

No. 76-570. International Longshoremen's Assn., AFL-CIO *v.* National Labor Relations Board et al. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 706.

No. 76-581. Russ et al. *v.* Ratliff et al. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 799.

No. 76-596. Transamerican Press, Inc., dba Overdrive *v.* Appleyard. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 1026.

No. 76-598. Sparkman *v.* Carter et al. Sup. Ct. Fla. Certiorari denied. Reported below: 335 So. 2d 802.

No. 76-608. Reliance Insurance Co. *v.* DeBoer Construction, Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 540 F 2d 486.

No. 76-609. Stebbins *v.* Weaver et al. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 2d 939.

No. 76-610. Ryan et al. *v.* Aurora City Board of Education et al. C. A. 6th Cir. Certiorari denied. Reported below: 540 F. 2d 222.

No. 76-622. Johnson Bronze Co. *v.* Ostapowicz. C. A. 3d Cir. Certiorari denied. Reported below: 541 F. 2d 394.

No. 76-628. Texas Petroleum Co. *v.* Compania Pelineon De Navegacion, S. A. C. A. 2d Cir. Certiorari denied. Reported below: 540 F. 2d 53.

No. 76-630. Nortek, Inc. *v.* Alexander Grant & Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 1013.

No. 76-633. Aaacon Auto Transport, Inc. *v.* State Farm Mutual Automobile Insurance Co. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 648.

No. 76-638. Financial Federal Savings & Loan Assn. *v.* Burleigh House, Inc. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 336 So. 2d 1145.

No. 76-643. Sanchez *v.* Denver & Rio Grande Western Railroad Co. C. A. 10th Cir. Certiorari denied. Reported below: 538 F. 2d 304.

No. 76-647. Perkins et al. *v.* Highway Patrol Division, Alabama Department of Public Safety. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 897.

No. 76-651. Fowlkes et ux. *v.* Intratex Gas Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-656. Bradford et al. *v.* Plains Cotton Cooperative Assn. C. A. 10th Cir. Certiorari denied. Reported below: 539 F. 2d 1249.

No. 76-663. Chrysler Motors Corp. et al. *v.* Greenfield et al. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 616.

No. 76-664. McDonough et al. *v.* Morgan et al. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 2d 527.

No. 76-666. Dayon *v.* Appellate Division, Supreme Court of New York, First Judicial Department, et al. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 309.

No. 76-669. Meshriy et ux. *v.* Sun Oil Co. Ct. App. Mich. Certiorari denied. Reported below: 67 Mich. App. 709, 242 N. W. 2d 497.

No. 76-679. Wyatt *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-702. Ralston Purina Co. *v.* Nabisco, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 679.

No. 76-731. Kahoun *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 541 F. 2d 284.

No. 76-735. Garza-Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76-738. Louisiana & Arkansas Railway Co. *v.* Martin et al. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 892.

No. 76-743. Chew *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 2d 759.

No. 76-5040. Cozzetti *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 335.

No. 76-5084. Spotts *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 534 F. 2d 331.

No. 76-5092. Seijo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 694.

No. 76-5164. Bastida *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied.

No. 76-5216. Penzabene *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5233. Austin *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 533 F. 2d 879.

No. 76-5272. Burts et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 1140.

No. 76-5289. Harry *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-5308. Kahley, aka Guido *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 467 Pa. 272, 356 A. 2d 745.

No. 76-5311. Wilkins *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 327.

No. 76-5316. Cohen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76-5333. Keplinger *v.* Superintendent, Maryland Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 705.

No. 76-5340. Eucker *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 718.

No. 76-5352. Anderson *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida, et al. Sup. Ct. Fla. Certiorari denied. Reported below: 336 So. 2d 599.

No. 76-5356. LeTourneur *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 1368.

No. 76-5368. Alvarez *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 1319.

No. 76-5377. La Chappelle *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1386.

No. 76-5386. Isom *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 335 So. 2d 1.

No. 76-5387. Cohen *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 59 Cal. App. 3d 241, 130 Cal. Rptr. 656.

No. 76-5398. Bowerski *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 76-5405. Davis *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5407. Riggins *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 682.

No. 76-5420. Williams *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 244 N. W. 2d 577.

No. 76-5424. Mullane *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-5427. Burbank *v.* Warden, Illinois State Penitentiary. C. A. 7th Cir. Certiorari denied. Reported below: 535 F. 2d 361.

No. 76-5428. Snipes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 76-5435. McRae *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 2d 943.

No. 76-5437. Bryson *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-5438. Kurowski *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 715.

No. 76-5445. Navarro-Varelas, aka Martin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 1331.

No. 76-5446. Agrusa *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 690.

No. 76-5447. Frazier *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 1322.

No. 76-5451. Chapman *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 537 S. W. 2d 947.

No. 76-5452. Moore *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 336 So. 2d 1183.

No. 76-5453. Reyes-Padron *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 33.

No. 76-5461. Budhu *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 76-5462. Wright *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 2d 1247.

No. 76-5467. Simpson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 1377.

No. 76-5469. Strahla *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 715.

No. 76-5470. Floyd *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 76-5473. Guerra *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76-5477. Thompson *v.* Mathews, Secretary of Health, Education, and Welfare. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76-5478. Harris *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5480. Miller *v.* Hampton, Chairman, U. S. Civil Service Commission, et al. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1141.

No. 76-5481. LaCount *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 237 Ga. 181, 227 S. E. 2d 31.

No. 76-5483. **Hendricks** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 513.

No. 76-5489. **Rathburn** *v.* **United States.** C. A. 2d Cir. Certiorari denied.

No. 76-5491. **Hughes** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1168.

No. 76-5493. **Johnson** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 326.

No. 76-5495. **Martinez** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 513.

No. 76-5497. **Brennan** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 715.

No. 76-5498. **Haymes** *v.* **Smith, Correctional Superintendent.** App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 2d 755, 382 N. Y. S. 2d 210.

No. 76-5499. **Moreno** *v.* **Immigration and Naturalization Service.** C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 718.

No. 76-5502. **Dimas** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1301.

No. 76-5505. **In re Hartzell.** C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 166.

No. 76-5510. **Rhodes** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 709.

No. 76-5516. **Brown** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 76-5531. **Kelley** *v.* **United States et al.** C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 2d 897.

No. 76-5549. Skinner *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 325.

No. 76-5555. Gonzalez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 76-5564. Farmer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 1169.

No. 76-5567. Timmons *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 2d 278.

No. 76-5592. Correa-Negron *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 340.

No. 76-5597. Bennett *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 63.

No. 76-5608. McDonnell *v.* Parratt, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1178.

No. 76-5609. Corley *v.* Cardwell, Prison Superintendent. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 349.

No. 76-5610. Freeman *v.* South Carolina. Sup. Ct. S. C. Certiorari denied.

No. 76-5621. Byrd *v.* Hopper, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1303.

No. 76-5624. Cooper et al. *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 240 Pa. Super. 477, 362 A. 2d 1041.

No. 76-5625. Tyner *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 76-5634. Hinton *v.* Michigan et al. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 329.

No. 76-5639. Mahone *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 519.

No. 76-5650. Henry *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 76-5652. Carnes et al. *v.* Kentucky et al. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 328.

No. 76-5653. Zenglein *v.* Lewis et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5655. Buckingham *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 540 S. W. 2d 660.

No. 76-5661. Zatko *v.* Los Angeles Times et al. C. A. 9th Cir. Certiorari denied.

No. 76-5666. Zatko *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 76-5669. Napier *v.* Gertrude et al. C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 825.

No. 76-5670. Colvin *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 264 Ind. 514, 346 N. E. 2d 737.

No. 76-5676. Barnett *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 354 N. E. 2d 879.

No. 76-5680. Wright *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 290 N. C. 45, 224 S. E. 2d 624.

No. 76-5685. Borodine *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 353 N. E. 2d 649.

No. 76-5686. Shockley *v.* Hopper, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1385.

No. 76-5692. Dickey *v.* Pacific Finance Loans et al. C. A. 9th Cir. Certiorari denied.

No. 76-5693. MORITA *v.* SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 217.

No. 76-5698. LAWRENCE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 290 N. C. 203, 225 S. E. 2d 786.

No. 76-5703. JONES *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 542 S. W. 2d 392.

No. 76-5706. STAGGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 515.

No. 76-5707. WILLIAMS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1142.

No. 76-5723. DRAKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1020.

No. 76-5728. PINCKNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 515.

No. 76-5737. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76-5738. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 543 F. 2d 577.

No. 76-5742. COIL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 76-5746. RATCLIFFE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76-5747. HERMOSILLO-NANEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 1230.

No. 76-5749. **Jones** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 2d 627.

No. 76-5750. **Grummel** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 789.

No. 76-5758. **Leak** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 521.

No. 76-5768. **Cozzetti** *v.* **Albright et al.** C. A. 9th Cir. Certiorari denied.

No. 76-5781. **Harstrom** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 845.

No. 76-5782. **Sims et al.** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 543 F. 2d 1089.

No. 76-5783. **Darby** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 1002.

No. 76-5784. **Johnson** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 520.

No. 76-5794. **Thomas** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 2d 1226.

No. 76-5795. **Flowers** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 520.

No. 76-5802. **Brabham** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76-5808. **Del Guzzi** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 426.

No. 76-5814. **Arnold** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 2d 1224.

No. 76-5827. **Ginyard** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76-5828. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76-5829. BOBNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76-5831. MASSARO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 544 F. 2d 547.

No. 75-1899. MCMANUS, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 535 F. 2d 460.

No. 76-10. CUTTING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 835.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted of mailing obscene materials in violation of 18 U. S. C. § 1461. I adhere to the view that this statute is " 'clearly overbroad and unconstitutional on its face.' " See, *e. g., Millican* v. *United States,* 418 U. S. 947, 948 (1974) (BRENNAN, J., dissenting), quoting *United States* v. *Orito,* 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would grant certiorari and reverse.

No. 76-389. LOCAL 1830 ET AL., GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO *v.* BAILEY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari denied. Reported below: 528 F. 2d 551 and 533 F. 2d 976.

No. 76-599. FISHMAN ET AL. *v.* SCHAFFER, SECRETARY OF STATE OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari.

No. 76-605. **Fridrich et al.** *v.* **Bradford et al.** C. A. 6th Cir. Certiorari denied. Mr. Justice White and Mr. Justice Blackmun would grant certiorari. Reported below: 542 F. 2d 307.

No. 76-684. **Estelle, Corrections Director** *v.* **Bruce.** C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 536 F. 2d 1051.

No. 76-708. **Fireman's Fund Insurance Co.** *v.* **Videfreeze Corp. et al.** C. A. 3d Cir. Motion to strike portion of petition for certiorari and other relief denied. Certiorari denied. Reported below: 540 F. 2d 1171.

No. 76-723. **Ross** *v.* **Morales.** C. A. 10th Cir. Certiorari denied. Mr. Justice Stewart and Mr. Justice Powell would grant certiorari.

No. 76-5283. **Thompson** *v.* **Oklahoma.** Ct. Crim. App. Okla. Certiorari denied. Reported below: — P. 2d —.

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

Petitioner was charged by information in an Oklahoma state court with murder. After a jury trial, he was convicted of manslaughter in the first degree. Thereafter, petitioner was charged in separate informations with two additional offenses arising out of the same episode: burglary in the first degree and carrying firearms. He pleaded guilty to these offenses and was sentenced to additional concurrent terms of 10 years' imprisonment for each offense. Petitioner then made an application for post-conviction relief in the State District Court attacking the latter two convictions on grounds of collateral estoppel and double jeopardy. The District Court denied the application, and the Oklahoma Court of Criminal Appeals affirmed.

I would grant the petition for certiorari and reverse the judgment of the Court of Criminal Appeals affirming the burglary and firearm convictions. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Cousins* v. *Maryland, ante,* p. 1027 (BRENNAN, J., dissenting); *Dempsey* v. *United States,* 423 U. S. 1079 (1976) (BRENNAN, J., dissenting); *Susi* v. *Flowers,* 423 U. S. 1006 (1975) (BRENNAN, J., dissenting); *Vardas* v. *Texas,* 423 U. S. 904 (1975) (BRENNAN, J., dissenting); *Stewart* v. *Iowa,* 423 U. S. 902 (1975) (BRENNAN, J., dissenting); *Waugh* v. *Gray,* 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri,* 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson,* 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico,* 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States,* 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory,* 66 N. J. 510, 333 A. 2d 257 (1975).

No. 76–5731. BERRYHILL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.,* at 231 (MARSHALL, J., dissenting). Reported below: 235 Ga. 549, 221 S. E. 2d 185.

No. 76-5300. Colbert *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Powell would grant certiorari. Reported below: 538 F. 2d 330.

No. 76-5825. Hines *v.* United States. C. A. 7th Cir. Motion of petitioner to consolidate for consideration with No. 76-5233, *Austin* v. *United States, supra,* p. 1043, granted. Certiorari denied. Reported below: 544 F. 2d 522.

*Rehearing Denied*

No. 643, O. T. 1970. Alexander *v.* United States, 400 U. S. 941. Motion for leave to file petition for rehearing denied.

No. 75-6782. Douglas *v.* Florida, *ante,* p. 871;

No. 76-77. Harris *v.* United States, *ante,* p. 939;

No. 76-94. Henry, aka Obadele *v.* United States, *ante,* p. 959;

No. 76-278. Jolley *v.* United States, *ante,* p. 964;

No. 76-5211. Capito *v.* United States, *ante,* p. 961;

No. 76-5284. Spencer *v.* Georgia, *ante,* p. 932;

No. 76-5307. Mathis *v.* Secretary of Defense, *ante,* p. 983;

No. 76-5318. Dioquino *v.* Workmen's Compensation Appeal Board of California et al., *ante,* p. 927; and

No. 76-5373. Smith, aka Machetti *v.* Georgia, *ante,* p. 932. Petitions for rehearing denied.

*Assignment Orders*

Orders of The Chief Justice designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit from January 20 to January 27, 1977, and in the United States Court of Appeals for the Seventh Circuit from May 23 to May 27, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

## JANUARY 12, 1977

*Miscellaneous Order*

No. A-560. GILMORE *v.* UTAH. Sup. Ct. Utah. Application for stay of execution by Latter-Day Saint Freedom Foundation as *amicus curiae*, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

## JANUARY 17, 1977

*Affirmed on Appeal*

No. 76-75. GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL. *v.* WEEKS ET AL. Appeal from D. C. E. D. La. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed.

*Appeals Dismissed*

No. 76-466. EDWARDS ET AL. *v.* PRICE ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 191 Colo. 46, 550 P. 2d 856.

No. 76-732. CONNOLLY DEVELOPMENT, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, MERCED COUNTY, ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 17 Cal. 3d 803, 553 P. 2d 637.

No. 76-5735. SANTANA *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 39 N. Y. 2d 830, 351 N. E. 2d 436.

No. 76-721. VITELLO *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 39 N. Y. 2d 847, 351 N. E. 2d 747.

No. 76-836. **Thompson** *v.* **Virginia.** Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 76-740. **Ditson, Trustee** *v.* **City of Boston.** Appeal from Ct. App. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Mass. App. —, 348 N. E. 2d 116.

*Vacated and Remanded on Appeal*

No. 76-752. **United States Parole Commission** *v.* **Shepard.** Appeal from C. A. 2d Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Moody* v. *Daggett, ante,* p. 78, and to consider whether case is moot. Reported below: 541 F. 2d 322.

*Miscellaneous Orders*

No. ———. **Buddy Systems, Inc.** *v.* **Exer-Genie, Inc., et al.** C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and to dispense with printing petition denied.

No. A-569. **Jurek** *v.* **Estelle, Corrections Director, et al.** Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Mr. Justice Powell, and by him referred to the Court, granted pending filing of a petition for writ of certiorari on or before the close of business, February 16, 1977. In the event a petition for writ of certiorari is so filed, this order is to remain in effect pending this Court's action on the petition. Should the petition for writ of certiorari be denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending issuance of mandate of this Court. The State of Texas is to file its response to petition for writ of certiorari on or before the close of business March 3, 1977.

MR. JUSTICE MARSHALL:

While I agree that a stay should issue, I cannot comprehend—and emphatically dissent from—the Court's decision to compel petitioner to prepare his petition for certiorari (and the State to prepare its response) on an expedited basis. When human life is at stake, such haste is as unseemly as it is inappropriate.

No. A-576. RITTER, CHIEF JUDGE, U. S. DISTRICT COURT *v.* UTAH. C. A. 10th Cir. Application for stay of execution denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 75-562. ROSEBUD SIOUX TRIBE *v.* KNEIP, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. [Certiorari granted, 425 U. S. 989.] Motion of the State of North Dakota et al. for leave to file an untimely brief as *amici curiae* denied.

No. 75-871. MANSON, CORRECTION COMMISSIONER *v.* BRATHWAITE. C. A. 2d Cir. [Certiorari granted, 425 U. S. 957.] Motion for appointment of counsel *nunc pro tunc* granted, and it is ordered that David S. Golub, Esquire, of Stamford, Conn., is appointed to serve as counsel for respondent in this case.

No. 75-1578. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* SYKES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 883.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose. Counsel for respondent also allotted an additional 15 minutes for oral argument.

No. 75-1707. OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. *v.* HODORY. Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, *ante,* p. 814.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 76-15. CONTINENTAL T. V., INC., ET AL. *v.* GTE SYLVANIA, INC. C. A. 9th Cir. [Certiorari granted, *ante,* p. 893.] Motion of Motor Vehicle Manufacturers Assn. for leave to file a brief as *amicus curiae* denied. Motions of International Franchise Assn. and Associated Equipment Distributors for leave to file briefs as *amici curiae* granted.

No. 76-37. VORCHHEIMER *v.* SCHOOL DISTRICT OF PHILADELPHIA ET AL. C. A. 3d Cir. [Certiorari granted, *ante,* p. 893.] Motion of American Jewish Committee et al. for leave to file a brief as *amici curiae* denied.

No. 76-316. BATES ET AL. *v.* STATE BAR OF ARIZONA. Appeal from Sup. Ct. Ariz. [Probable jurisdiction noted, *ante,* p. 813.] Motion of the State Bar of California for leave to participate in oral argument as *amicus curiae* denied. Motion of Richard B. Spohn, Director of Department of Consumer Affairs for the State of California, for leave to file a brief as *amicus curiae* denied.

No. 76-333. UNITED AIR LINES, INC. *v.* EVANS. C. A. 7th Cir. [Certiorari granted, *ante,* p. 917.] Motion of Isaiah S. Dorfman, Esquire, to permit Alan M. Levin, Esquire, to argue *pro hac vice* on behalf of respondent granted. Motions of Equal Employment Advisory Council et al. and Delta Air Lines, Inc., et al. for leave to file briefs as *amici curiae* granted. Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* denied.

No. 76-615. SLOAN *v.* MULLIGAN, U. S. CIRCUIT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 76-5844. JOHNSON *v.* MALLEY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

*Probable Jurisdiction Noted*

No. 76–933. Finch, Governor of Mississippi, et al. *v.* Connor et al.;

No. 76–934. United States *v.* Finch, Governor of Mississippi, et al.; and

No. 76–935. Connor et al. *v.* Finch, Governor of Mississippi, et al. Appeals from D. C. S. D. Miss. Probable jurisdiction noted. Cases consolidated with No. 76–777 [*Connor* v. *Finch,* probable jurisdiction noted, *ante,* p. 1010] and a total of one and one-half hours allotted for oral argument. Parties shall file and exchange briefs on the merits on or before the close of business Monday, February 7, 1977. Responsive briefs, if any, shall be filed and exchanged on or before the close of business Monday, February 21, 1977. Oral argument set for Monday, February 28, 1977. Reported below: See 419 F. Supp. 1072 and 1089; 422 F. Supp. 1014.

*Certiorari Granted*

No. 76–539. Dayton Board of Education et al. *v.* Brinkman et al. C. A. 6th Cir. Certiorari granted. Reported below: 539 F. 2d 1084.

No. 76–446. Enomoto, Corrections Director, et al. *v.* Navarette. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 536 F. 2d 277.

No. 76–607. Miree et al. *v.* DeKalb County, Georgia, et al.;

No. 76–659. Phillips *v.* DeKalb County, Georgia, et al.;

No. 76–700. Fireman's Fund Insurance Co. *v.* DeKalb County, Georgia, et al.; and

No. 76–722. Fields *v.* DeKalb County, Georgia, et al. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 538 F. 2d 643.

No. 76-5344. Moore *v.* Illinois. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 534 F. 2d 331.

No. 76-5416. Jones *v.* Hildebrant et al. Sup. Ct. Colo. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 191 Colo. 1, 550 P. 2d 339.

*Certiorari Denied.* (See also Nos. 76-721 and 76-740, *supra.*)

No. 76-308. Johnson et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 179, 539 F. 2d 181.

No. 76-490. Lehigh & New England Railway Co. *v.* Interstate Commerce Commission et al. C. A. 3d Cir. Certiorari denied. Reported below: 540 F. 2d 71.

No. 76-498. Kappelmann et ux. *v.* Delta Air Lines, Inc., et al. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 163, 539 F. 2d 165.

No. 76-518. Cooper *v.* New York. Sup. Ct. N. Y., New York County. Certiorari denied.

No. 76-533. Edwards *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 540 S. W. 2d 641.

No. 76-580. Breckinridge et al. *v.* Rumsfeld, Secretary of Defense, et al. C. A. 6th Cir. Certiorari denied. Reported below: 537 F. 2d 864.

No. 76-593. Rojas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 216.

No. 76-600. Dreske *v.* Holt, Sheriff. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 105.

No. 76-604. United Contractors, Inc., et al. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 713.

No. 76-644. Buckley *v.* Littell; and

No. 76-652. Littell *v.* Buckley. C. A. 2d Cir. Certiorari denied. Reported below: 539 F. 2d 882.

No. 76-690. Pierre J. LeLandais & Co., Inc., et al. *v.* MDS-Atron, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 421.

No. 76-703. Ochs et al. *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 543 S. W. 2d 355.

No. 76-716. Fisher *v.* First National Bank of Chicago. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 2d 1284.

No. 76-717. Hunt et al. *v.* Pan American Energy, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 2d 894.

No. 76-733. Kalin *v.* Youngblood et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-736. La Mirada Trucking, Inc., et al. *v.* Teamsters Local Union 166 et al. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 286.

No. 76-771. Hurt *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 2d 242.

No. 76-834. Peroff *v.* Hylton, U. S. Marshal, et al. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 1247.

No. 76-5313. White *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1142.

No. 76-5324. Clark *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 1327.

No. 76-5349. Crowder *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 165, 543 F. 2d 312.

No. 76-5350. Thomas *v.* United States; and
No. 76-5402. Mills *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: No. 76-5350, 538 F. 2d 331; No. 76-5402, 538 F. 2d 330.

No. 76-5375. Ecker *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 31, 543 F. 2d 178.

No. 76-5380. Ricketts *v.* Texas et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 974.

No. 76-5395. Ayendes *v.* United States; and
No. 76-5460. Noles *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 541 F. 2d 601.

No. 76-5408. Manville *v.* Michigan. Sup. Ct. Mich. Certiorari denied.

No. 76-5425. Boyer *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 63 Ill. 2d 433, 349 N. E. 2d 50.

No. 76-5443. Diaz *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 2d 757, 382 N. Y. S. 2d 213.

No. 76-5458. Rodriguez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 76-5459. Lopez-Escalante *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-5492. Thomas *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 320.

No. 76-5494. Petersen *v.* United States; and
No. 76-5512. Temple et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 2d 995.

No. 76-5506. Urquhart *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76-5511. NORTHERN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 541 S. W. 2d 956.

No. 76-5513. R. S. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1181.

No. 76-5524. CLARK *v.* FIKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 2d 750.

No. 76-5532. CAMPBELL *v.* SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 539 F. 2d 705.

No. 76-5575. STEPHENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1094.

No. 76-5583. EZZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76-5619. CRANE *v.* HINSHAW ET AL. C. A. 9th Cir. Certiorari denied.

No. 76-5641. SCOTT *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 711.

No. 76-5690. McDONALD *v.* TENNESSEE ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 76-5695. WEIR *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1178.

No. 76-5704. COCHRELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 76-5716. WILSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 76-5719. TRANTOW *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5724. **Powell v. Alabama.** C. A. 5th Cir. Certiorari denied.

No. 76-5741. **Omernick v. Crooks et al.** C. A. 7th Cir. Certiorari denied.

No. 76-5744. **Hogan v. Estelle, Corrections Director.** C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 238.

No. 76-5745. **Tanner v. Vincent, Correctional Superintendent.** C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 2d 932.

No. 76-5751. **Morith v. Barr et al.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5753. **Hill v. Minnesota.** Sup. Ct. Minn. Certiorari denied. Reported below: 309 Minn. 206, 244 N. W. 2d 728.

No. 76-5754. **Scott, aka Whatley v. Wisconsin.** Sup. Ct. Wis. Certiorari denied. Reported below: 73 Wis. 2d 504, 243 N. W. 2d 215.

No. 76-5755. **Smith v. Washington.** Ct. App. Wash. Certiorari denied. Reported below: 15 Wash. App. 103, 547 P. 2d 299.

No. 76-5760. **Fields v. New York.** App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 2d 757, 382 N. Y. S. 2d 214.

No. 76-5762. **Bailey v. Delaware Correctional Center.** C. A. 3d Cir. Certiorari denied.

No. 76-5765. **Miller v. Miller.** C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 715.

No. 76-5772. **Baker v. United States et al.** C. A. 7th Cir. Certiorari denied.

No. 76-5777. **Jones** *v.* **California.** Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76-5798. **Tucker** *v.* **United States.** C. A. 6th Cir. Certiorari denied.

No. 76-5823. **Bates** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 1002.

No. 76-5852. **Scott** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 38.

No. 76-5877. **Smith** *v.* **United States.** C. A. 8th Cir. Certiorari denied.

No. 76-5882. **Murphy** *v.* **United States.** C. A. 7th Cir. Certiorari denied.

No. 76-5913. **Sanders** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 190.

No. 76-601. **Evans et al.** *v.* **Hills, Secretary of Housing and Urban Development, et al.** C. A. 2d Cir. Certiorari denied. **Mr. Justice Brennan** and **Mr. Justice Marshall** would grant certiorari. Reported below: 537 F. 2d 571.

No. 76-646. **Bradford School Bus Transit, Inc., et al.** *v.* **Chicago Transit Authority et al.** C. A. 7th Cir. Certiorari denied. **Mr. Justice Stevens** took no part in the consideration or decision of this petition. Reported below: 537 F. 2d 943.

No. 76-655. **Creel et al.** *v.* **Freeman et al.** C. A. 5th Cir. Certiorari denied. **Mr. Justice White** would grant certiorari. Reported below: 531 F. 2d 286.

*Rehearing Denied*

No. 75-929. **Estelle, Corrections Director** *v.* **Gamble,** *ante,* p. 97; and

No. 76-179. **Markert** *v.* **United States,** *ante,* p. 999. Petitions for rehearing denied.

No. 76-206. CONLEY *v.* SAWYER, *ante*, p. 999;

No. 76-381. CONLEY *v.* HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., *ante*, p. 1000; and

No. 76-5530. STEPHENS *v.* GEORGIA, *ante*, p. 986. Petitions for rehearing denied.

## JANUARY 24, 1977

### *Dismissal Under Rule 60*

No. 76-649. AMERADA HESS CORP. ET AL *v.* FAHY, JUDGE, U. S. COURT OF APPEALS, ET AL. C. A. D. C. Cir. Motion for leave to file petition for writ of certiorari and other relief dismissed under this Court's Rule 60. Reported below: 177 U. S. App. D. C. 209, 543 F. 2d 356.

## JANUARY 25, 1977

### *Affirmed on Appeal*

No. 76-764. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., ET AL. Affirmed on appeal from D. C. N. D. Ind. Reported below: 418 F. Supp. 9.

### *Appeals Dismissed*

No. 76-459. COMMUNICATIONS WORKERS OF AMERICA *v.* WESTERN ELECTRIC CO., INC., ET AL.; and

No. 76-478. COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT ET AL. *v.* WESTERN ELECTRIC CO., INC., ET AL. Appeals from Sup. Ct. Colo. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would note probable jurisdiction and set cases for oral argument. Reported below: 191 Colo. 128, 551 P. 2d 1065.

No. 76-852. OATMAN *v.* STATE TAX COMMISSION. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of jurisdiction. Reported below: 50 App. Div. 2d 1015, 377 N. Y. S. 2d 659.

No. 76–5456. Flanigan *v.* Public Employees' Retirement Assn. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 191 Colo. 198, 551 P. 2d 702.

No. 76–5835. Dawn *v.* Wenzler et al. Appeal from D. C. C. D. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

*Vacated and Remanded on Appeal.* (See Nos. 76–212, 76–458, and No. 76–468, *infra.*)

*Certiorari Granted—Reversed and Remanded.* (See No. 76–201, *ante,* p. 492.)

*Certiorari Granted—Vacated and Remanded*

No. 75–1002. Joseph Skilken & Co. et al. *v.* City of Toledo et al. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., ante,* p. 252, and *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). Reported below: 528 F. 2d 867.

No. 76–212. Metropolitan School District of Perry Township, Marion County, Indiana *v.* Buckley et al.;

No. 76–458. School Town of Speedway, Marion County, Indiana, et al. *v.* Buckley et al.; and

No. 76–468. Metropolitan School District of Lawrence Township, Marion County, Indiana, et al. *v.* Buckley et al. Appeals from C. A. 7th Cir.; and

No. 76–515. Bowen, Governor of Indiana, et al. *v.* United States et al.;

No. 76–520. Board of School Commissioners of Indianapolis et al. *v.* Buckley et al.; and

No. 76–522. Housing Authority of Indianapolis *v.* Buckley et al. C. A. 7th Cir. Certiorari granted in Nos.

76-515, 76-520, and 76-522. Judgment vacated and cases remanded for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, *ante*, p. 252; and *Washington* v. *Davis*, 426 U. S. 229 (1976). MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS dissent. Reported below: 541 F. 2d 1211.

*Miscellaneous Orders*

No. A-545. ESTATE OF WHITLOCK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. Application for stay of execution and enforcement of judgment of the United States Court of Appeals for the Tenth Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 547 F. 2d 506.

No. D-66. IN RE DISBARMENT OF SEFFERN. Disbarment entered. [For earlier order, see *ante*, p. 914.]

No. D-76. IN RE DISBARMENT OF THOMPSON. Disbarment entered. [For earlier order, see *ante*, p. 937.]

No. D-80. IN RE DISBARMENT OF KATES. Disbarment entered. [For earlier order, see *ante*, p. 953.]

No. D-97. IN RE DISBARMENT OF DEUTSCH. It is ordered that Robert I. Deutsch, of Boston, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75-1126. TRANS WORLD AIRLINES, INC. *v.* HARDISON ET AL.; and

No. 75-1385. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, ET AL. *v.* HARDISON ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 958.] Motions of Equal Employment Advisory Council and Chrysler Corp. for leave to file briefs as *amici curiae* granted.

No. 75–1870. E. I. du Pont de Nemours & Co. et al. *v.* Collins et al.; and

No. 75–1872. Securities and Exchange Commission *v.* Collins et al. C. A. 8th Cir. [Certiorari granted, *ante,* p. 815.] Motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted an additional 15 minutes for oral argument.

No. 76–15. Continental T. V., Inc., et al. *v.* GTE Sylvania, Inc. C. A. 9th Cir. [Certiorari granted, *ante,* p. 893.] Motion of Motor Vehicle Manufacturers Assn. to reconsider order denying leave to file brief as *amicus curiae* granted, and it is now ordered that motion for leave to file be granted and brief filed.

No. 76–180. Smith, Administrator, New York City Human Resources Administration, et al. *v.* Organization of Foster Families for Equality & Reform et al.;

No. 76–183. Shapiro, Executive Director, New York State Board of Social Welfare, et al. *v.* Organization of Foster Families for Equality & Reform et al.;

No. 76–5193. Rodriguez et al. *v.* Organization of Foster Families for Equality & Reform et al.; and

No. 76–5200. Gandy et al. *v.* Organization of Foster Families for Equality & Reform et al. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante,* p. 883.] Motion of A Group of Concerned Persons for Children for leave to file a brief as *amicus curiae* granted.

No. 76–333. United Air Lines, Inc. *v.* Evans. C. A. 7th Cir. [Certiorari granted, *ante,* p. 917.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 76–682. Santa Clara Pueblo et al. *v.* Martinez et al. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 76-749. Pfizer, Inc., et al. v. Government of India et al. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Mr. Justice Blackmun took no part in the consideration or decision in this matter.

No. 76-5763. Mayfield v. United States. Motion for leave to file petition for writ of habeas corpus denied.

No. 76-742. Great National Life Insurance Co. et al. v. Pine Gate Associates, Ltd. Motion for leave to file petition for writ of prohibition and other relief denied.

No. 76-939. American Telephone & Telegraph Co. et al. v. United States. Motion for leave to file petition for writ of certiorari and/or petition for writ of certiorari before judgment denied.

*Certiorari Granted*

No. 75-536. Nashville Gas Co. v. Satty. C. A. 6th Cir. Certiorari granted. Reported below: 522 F. 2d 850.

No. 75-1069. Richmond Unified School District et al. v. Berg. C. A. 9th Cir. Certiorari granted. Reported below: 528 F. 2d 1208.

No. 76-398. Citizens & Southern National Bank v. Bougas. Ct. App. Ga. Certiorari granted. Reported below: 138 Ga. App. 706, 227 S. E. 2d 434.

No. 76-761. Ballew v. Georgia. Ct. App. Ga. Certiorari granted. Reported below: 138 Ga. App. 530, 227 S. E. 2d 65.

No. 75-1914. Monell et al. v. Department of Social Services of the City of New York et al. C. A. 2d Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 532 F. 2d 259.

No. 76-835. UNITED STATES *v.* NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari granted. Reported below: 538 F. 2d 956.

No. 76-5325. BROWDER *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 534 F. 2d 331.

*Certiorari Denied.* (See also Nos. 76-5456 and 76-5835, *supra.*)

No. 76-483. AYO-GONZALEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 652.

No. 76-494. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542 ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 902.

No. 76-495. KAKE-TV & RADIO, INC. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 537 F. 2d 1121.

No. 76-534. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, ET AL. *v.* OXCO BRUSH DIVISION OF VISTRON CORP. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 329.

No. 76-542. THOMASON *v.* SANCHEZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 539 F. 2d 955.

No. 76-553. WALD TRANSFER & STORAGE CO. ET AL. v. NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 657.

No. 76-565. BAILEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 363 A. 2d 312.

No. 76-572. BUZZARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 540 F. 2d 1383.

No. 76-568. White & Case et al. *v.* Securities and Exchange Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 56, 538 F. 2d 404.

No. 76-575. Kutas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 527.

No. 76-583. Wright *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 542 F. 2d 975.

No. 76-584. Sinclair *v.* Hanover Insurance Co. et al. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 345.

No. 76-586. Coplen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 211.

No. 76-589. Birchfield *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-623. Bankers Life & Casualty Co. *v.* Hoffmann, Secretary of the Army, et al. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 625.

No. 76-626. Heftel Broadcasting Honolulu, Inc. *v.* Wong, Director of Taxation. Sup. Ct. Hawaii. Certiorari denied. Reported below: 57 Haw. 175, 554 P. 2d 242.

No. 76-632. Lord, Bissell & Brook et al. *v.* Securities and Exchange Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 56, 538 F. 2d 404.

No. 76-637. Russell Corp. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 596, 537 F. 2d 474.

No. 76-661. Woolen et al. *v.* United States; and
No. 76-5471. Woolen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 720.

No. 76-670. SECOND AVENUE LIMITED DIVIDEND HOUSING ASSN. ET AL. *v.* HILLS, SECRETARY, HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1255.

No. 76-693. BERGER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 76-698. LYONS *v.* FAGAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 546 F. 2d 413.

No. 76-710. BOARD OF EDUCATION OF JEFFERSON COUNTY ET AL. *v.* NEWBURG AREA COUNCIL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 541 F. 2d 538.

No. 76-851. ALBERT ET AL. *v.* FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, EXECUTOR. Ct. App. Mich. Certiorari denied. Reported below: 66 Mich. App. 252, 238 N. W. 2d 827.

No. 76-737. CAMPBELL *v.* STAPLE COTTON COOPERATIVE ASSN. Sup. Ct. Miss. Certiorari denied. Reported below: 334 So. 2d 378.

No. 76-751. KOEHLER MANAGEMENT CORP. ET AL. *v.* NICKELS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 541 F. 2d 611.

No. 76-756. HANSON *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 1352.

No. 76-812. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76-822. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1023.

No. 76-842. BLOOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 704.

No. 76-866. **Ong** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 2d 331.

No. 76-896. **Jones** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 1112.

No. 76-5454. **Hall** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 2d 1229.

No. 76-5463. **Szymanski** *v.* **Michigan.** Sup. Ct. Mich. Certiorari denied.

No. 76-5474. **Johnson** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 76-5476. **Clyne** *v.* **United States.** C. A. 5th Cir. Certiorari denied.

No. 76-5485. **Sellers** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 547 F. 2d 785.

No. 76-5496. **De Kaplany** *v.* **Enomoto, Corrections Director.** C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 2d 975.

No. 76-5501. **Moreno-Ortiz** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 1169.

No. 76-5518. **Boswell** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1168.

No. 76-5521. **Rose** *v.* **United States**; and
No. 76-5543. **Berry** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1167.

No. 76-5533. **Byram** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76-5534. **Bagley** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 162.

No. 76-5536. **Hutton** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 76-5539. Lepera *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5542. Kelley *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5550. Tyler *v.* Ryan et al. C. A. 8th Cir. Certiorari denied.

No. 76-5556. Sellars *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1104.

No. 76-5559. Cagle *v.* McCune, Warden. C. A. 10th Cir. Certiorari denied.

No. 76-5560. McKinney *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5562. Proffitt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 910.

No. 76-5578. Fulcher *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 76-5611. Irby *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 76-5629. Bolanos-Caamano *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76-5649. Murphy *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 336 So. 2d 213.

No. 76-5679. White *v.* Election Laws of the State of Colorado. Sup. Ct. Colo. Certiorari denied.

No. 76-5702. Byrum *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 833.

No. 76-5708. Roberts *v.* Director, Department of Corrections of Rhode Island. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 2d 540.

No. 76-5790. **Boothe** *v.* **Missouri.** Ct. App. Mo., Kansas City Dist. Certiorari denied. Reported below: 534 S. W. 2d 74.

No. 76-5791. **Ogrod** *v.* **Pennsylvania.** C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 512.

No. 76-5799. **Lasley** *v.* **Minnesota.** Sup. Ct. Minn. Certiorari denied. Reported below: 306 Minn. 224, 236 N. W. 2d 604.

No. 76-5805. **Collins** *v.* **California.** Sup. Ct. Cal. Certiorari denied. Reported below: 17 Cal. 3d 687, 552 P. 2d 742.

No. 76-5806. **Zatko** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 76-5813. **Wheeldon** *v.* **Reynolds.** Sup. Ct. Colo. Certiorari denied.

No. 76-5816. **Crane** *v.* **Ram Enterprises, Inc.** C. A. 9th Cir. Certiorari denied.

No. 76-5817. **Crane** *v.* **City of San Diego et al.** C. A. 9th Cir. Certiorari denied.

No. 76-5818. **Crane** *v.* **County of Riverside et al.** C. A. 9th Cir. Certiorari denied.

No. 76-5819. **Banks** *v.* **Indiana.** Sup. Ct. Ind. Certiorari denied. Reported below: 265 Ind. 71, 351 N. E. 2d 4.

No. 76-5822. **Smock** *v.* **Kessler, Judge, et al.** Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 76-5849. **Bynum** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76-5861. **Moss** *v.* **United States**; and

No. 76-5863. **Downey** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 544 F. 2d 954.

No. 76–5904. **Mastrangelo** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–5907. **Greene** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 2d 277.

No. 76–5908. **Altstatt** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76–5912. **Smith** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 425.

No. 76–5955. **Frazier** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 71.

No. 76–592. **Kansas Refined Helium Co., a Division of Angle Industries, Inc.** *v.* **National Labor Relations Board et al.** C. A. D. C. Cir. Certiorari denied. Mr. Justice White and Mr. Justice Blackmun would grant certiorari. Reported below: 178 U. S. App. D. C. 301, 547 F. 2d 598.

No. 76–658. **Norfolk, Baltimore & Carolina Lines, Inc., et al.** *v.* **Director, Office of Workers' Compensation Programs, U. S. Department of Labor, et al.** C. A. 4th Cir. Motion of Nellie Smith Rouse, widow of respondent Lee Rouse, for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 539 F. 2d 378.

No. 76–691. **Thompson** *v.* **Gaffney et al.** C. A. 6th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice Marshall would grant certiorari. Reported below: 540 F. 2d 251.

No. 76–725. **Armstrong et al.** *v.* **Aiken.** Sup. Ct. Alaska. It appearing there is no final judgment within the meaning of 28 U. S. C. § 1257, certiorari denied.

No. 76-753. **Borri** *v.* **Siverson.** Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 76-801. **Richmond** *v.* **Chesapeake & Ohio Railway Co.** Sup. Ct. Va. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 217 Va. 258, 227 S. E. 2d 707.

No. 76-5449. **Drane** *v.* **United States**; and

No. 76-5577. **Jenkins et al** *v.* **United States.** C. A. 5th Cir. Motion to defer consideration in No. 76-5577 denied. Certiorari denied. Reported below: 533 F. 2d 903.

*Rehearing Denied*

No. 74-1589. **General Electric Co.** *v.* **Gilbert et al.**, *ante*, p. 125;

No. 74-1590. **Gilbert et al.** *v.* **General Electric Co.**, *ante*, p. 125;

No. 76-249. **Poll** *v.* **United States**, *ante*, p. 977;

No. 76-394. **Timmons** *v.* **Lawton et al.**, *ante*, p. 1000;

No. 76-487. **Bell** *v.* **Hopper, Warden**, *ante*, p. 989;

No. 76-488. **Roanwell Corp.** *v.* **Plantronics, Inc.**, *ante*, p. 1004; and

No. 76-516. **Salvucci** *v.* **New York Racing Assn., Inc., et al.**, *ante*, p. 1001. Petitions for rehearing denied.

No. 76-73. **Young et al.** *v.* **United States**, *ante*, p. 999. Motion for leave to file petition for rehearing denied.

*Assignment Order*

An order of The Chief Justice designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit from February 28, 1977, to March 4, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

## FEBRUARY 1, 1977

*Dismissal Under Rule 60*

No. 76-645. BONAVENTURE *v.* FIRST STATE BANK ET AL. Sup. Ct. N. J. Certiorari dismissed under this Court's Rule 60.

## FEBRUARY 4, 1977

*Dismissal Under Rule 60*

No. 76-928. BARSZCZ *v.* BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 504, COOK COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 539 F. 2d 715.

## FEBRUARY 10, 1977

*Dismissal Under Rule 60*

No. 76-5910. SLAUGHTER *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 546 F. 2d 419.

## FEBRUARY 18, 1977

*Miscellaneous Order*

No. A-683. DIXON *v.* THOMPSON, WARDEN, ET AL. Dixon has filed a motion, addressed to MR. JUSTICE STEWART as Circuit Justice, and by him referred to the Court, for leave to file a petition for a writ of habeas corpus under 28 U. S. C. §§ 2241 (b) and 1651 (a), and this Court's Rules 31 and 50. On January 27, 1977, the District Court for the Middle District of Tennessee denied Dixon's habeas corpus petition. Dixon has not appealed from that denial, but the record reveals that the time for appeal has not expired.

This Court does not, absent exceptional circumstances, exercise its jurisdiction to issue writs of habeas corpus when an adequate remedy may be had in a lower federal court. *Ex parte Abernathy,* 320 U. S. 219 (1943); *Ex parte Tracy,* 249

U. S. 551 (1919). Since an appeal from the judgment of the District Court may still be had and since there appear to be no exceptional circumstances justifying exercise of this Court's discretionary jurisdiction, the motion is denied. Denial of the motion is not an adjudication on the merits, and is made without prejudice to alternative or subsequent applications for relief. *Ex parte Abernathy, supra; Ex parte Tracy, supra.*

### February 22, 1977

*Affirmed on Appeal*

No. 76-712. Stewart *v.* United States et al. Affirmed on appeal from D. C. Idaho. The Chief Justice, Mr. Justice Blackmun, and Mr. Justice Powell would dismiss appeal for want of jurisdiction.

No. 76-757. Sterling Colorado Beef Co. *v.* United States et al. Affirmed on appeal from D. C. Colo.

No. 76-818. Fitch, Judge, et al. *v.* Silva et al. Affirmed on appeal from D. C. W. D. Tex.

No. 76-5926. Mendes et al. *v.* Coughenour, Court Administrator for New Mexico. Affirmed on appeal from D. C. N. M.

No. 76-5929. Bisson *v.* New Hampshire. Affirmed on appeal from Sup. Ct. N. H. Reported below: 116 N. H. 711, 366 A. 2d 487.

*Appeals Dismissed*

No. 76-734. Ingalls Iron Works Co. *v.* Chilivis, Revenue Commissioner. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Powell would note probable jurisdiction and set case for oral argument. Reported below: 237 Ga. 479, 228 S. E. 2d 866.

No. 76-744. BENNETT *v.* THOMSON ET AL. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. Reported below: 116 N. H. 453, 363 A. 2d 187.

No. 76-819. REGAN, COUNTY EXECUTIVE OF ERIE COUNTY, ET AL. *v.* TOIA, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 40 N. Y. 2d 837, 356 N. E. 2d 276.

No. 76-857. FRAZIER *v.* ALUM CREST ET AL. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question. Reported below: 48 Ohio App. 2d 283, 357 N. E. 2d 407.

No. 76-868. JAMES *v.* ILLINOIS. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of substantial federal question. Reported below: 38 Ill. App. 3d 594, 348 N. E. 2d 295.

No. 76-805. BUGG ET AL. *v.* MARYLAND TRANSPORTATION AUTHORITY ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 31 Md. App. 622, 358 A. 2d 562.

No. 76-821. EDWARDS ET UX. *v.* SUBURBAN TRUST CO. Appeal from Ct. App. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 29 N. C. App. 422, 224 S. E. 2d 307.

No. 76-823. SPARTAN ELECTRICAL CONSTRUCTION CO., INC. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-862. CAMPBELL *v.* GEORGIA. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 139 Ga. App. 389, 228 S. E. 2d 309.

No. 76-888. AVCO COMMUNITY DEVELOPERS, INC. *v.* SOUTH COAST REGIONAL COMMISSION ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 17 Cal. 3d 785, 553 P. 2d 546.

No. 76-5951. HAMBURG *v.* WYOMING. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76-830. MEYERS ET AL. *v.* ROBERTS, NOBLES COUNTY AUDITOR. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 310 Minn. 358, 246 N. W. 2d 186.

No. 76-918. TRIUMPH HOSIERY MILLS, INC. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 469 Pa. 92, 364 A. 2d 919.

No. 76-923. JORDAN ET AL. *v.* GODWIN, GOVERNOR OF VIRGINIA, ET AL. Appeal from D. C. E. D. Va. dismissed for want of jurisdiction.

No. 76-5943. RAITPORT *v.* COMMISSIONERS OF CECIL COUNTY. Appeal from D. C. Md. dismissed for want of jurisdiction.

*Vacated and Remanded on Appeal*

No. 76-672. BURLINGTON NORTHERN, INC., ET AL. *v.* STERLING COLORADO BEEF CO. ET AL. Appeal from D. C. Colo. Judgment vacated and case remanded with directions to enter a fresh decree from which a timely appeal may be taken to the United States Court of Appeals for the Tenth Circuit.

No. 76-922. STIVERS ET AL. *v.* MINNESOTA ET AL. Appeal from D. C. Minn. Judgment vacated and case remanded for entry of a fresh order from which a timely appeal may be taken to the United States Court of Appeals for the Eighth Circuit. *MTM, Inc.* v. *Baxley*, 420 U. S. 799 (1975). Reported below: 419 F. Supp. 87.

*Vacated and Remanded After Probable Jurisdiction Noted*

No. 75-1691. GUEST, PRESIDENT OF METHODIST HOSPITAL, ET AL. *v.* FITZPATRICK, DISTRICT ATTORNEY OF PHILADELPHIA, ET AL.; and

No. 75-1698. WILLIAMSPORT HOSPITAL ET AL. *v.* FITZPATRICK, DISTRICT ATTORNEY OF PHILADELPHIA, ET AL. Appeals from D. C. E. D. Pa. [Probable jurisdiction noted, *ante*, p. 813.] Judgment in No. 75-1691 vacated and case remanded with directions to dismiss cause as moot. Judgment in No. 75-1698 vacated and case remanded for reconsideration in light of intervening circumstances. Reported below: 409 F. Supp. 818.

*Certiorari Granted—Affirmed.* (See No. 76-613, *ante*, p. 648.)

*Certiorari Granted—Vacated and Remanded*

No. 76-831. RAHMAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari granted. On representation of the Acting Solicitor General set forth in his memorandum for the United States, filed February 4, 1977, judgment vacated and case remanded for reconsideration in light of position presently asserted by the Government.

No. 76-5593. Gordon *v.* United States. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to Court of Appeals for further proceedings, including re-entry of its judgment affirming petitioner's conviction and consideration of the appointment of counsel for petitioner in connection with seeking review in this Court of the judgment of the Court of Appeals. *Doherty* v. *United States,* 404 U. S. 28 (1971); *Schreiner* v. *United States,* 404 U. S. 67 (1971). Reported below: 539 F. 2d 703.

### *Vacated and Remanded After Certiorari Granted*

No. 75-679. Internal Revenue Service *v.* Fruehauf Corp. et al. C. A. 6th Cir. [Certiorari granted, 423 U. S. 1047.] Judgment vacated and case remanded for reconsideration in light of the Tax Reform Act of 1976, 90 Stat. 1520. Reported below: 522 F. 2d 284.

### *Miscellaneous Orders*

No. A-346 (76-694). Buckley et al. *v.* McRae et al. Renewed application for stay of order of the United States District Court for the Eastern District of New York denied.

No. A-399. Ward *v.* United States. C. A. 5th Cir. Application for bail, presented to Mr. Justice White, and by him referred to the Court, denied.

No. A-469. McCarthy et ux. *v.* United States et al. C. A. 6th Cir. Application for stay, presented to The Chief Justice, and by him referred to the Court, denied.

No. A-571. Dubose et al. *v.* Harris, Secretary of Housing and Urban Development, et al. Application to vacate stay of a preliminary injunction entered by the United States District Court for the District of Connecticut, presented to Mr. Justice Marshall, and by him referred to the Court, denied.

No. A-616 (76-1104). SAGRACY *v.* UNITED STATES. C. A. 6th Cir. Application for stay of execution and enforcement of judgment of conviction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-643. ST. LOUIS BOARD OF EDUCATION *v.* CALDWELL ET AL. Application to recall and stay mandate of the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied by an equally divided Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application. Reported below: 546 F. 2d 768.

No. A-647 (76-978). BRIDGETON HOSPITAL ASSN. ET AL. *v.* DOE ET AL. Application for stay of judgment of the Supreme Court of New Jersey, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 75-1181. BATTERTON, SECRETARY, DEPARTMENT OF HUMAN RESOURCES OF MARYLAND *v.* FRANCIS ET AL. C. A. 4th Cir. [Certiorari granted, *ante,* p. 939.] Motion of respondent Francis to strike brief of Chamber of Commerce of the United States denied.

No. 75-1264. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, LOCAL 790 *v.* ROBBINS & MYERS, INC., ET AL.; and

No. 75-1276. GUY *v.* ROBBINS & MYERS, INC., ET AL., *ante,* p. 229. Motion of respondent Robbins & Myers, Inc., to retax costs denied.

No. 75-1704. ALEXANDER, SECRETARY OF THE ARMY *v.* FIOTO. Appeal from D. C. E. D. N. Y. [Probable jurisdiction noted *sub nom. Hoffmann* v. *Fioto, ante,* p. 814.] Motion of the Acting Solicitor General to permit Stephen L. Urbanczyk, Esquire, to present oral argument *pro hac vice* granted.

No. 75–1707. **Ohio Bureau of Employment Services et al.** *v.* **Hodory.** Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, *ante*, p. 814.] Motion of appellants for leave to allocate time to the Chamber of Commerce of the United States to argue as *amicus curiae* denied. Motion of Local No. 1375, United Steel Workers of America, for leave to file a brief as *amicus curiae* denied.

No. 75–1906. **Henderson, Correctional Superintendent** *v.* **Kibbe.** C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the District Attorney of Monroe County, New York, for leave to participate in oral argument as *amicus curiae* denied.

No. 76–120. **United States** *v.* **Martin Linen Supply Co. et al.** C. A. 5th Cir. [Certiorari granted, *ante*, p. 917.] Motion of the Acting Solicitor General to permit Frank H. Easterbrook, Esquire, to present oral argument *pro hac vice* granted.

No. 76–404. **Illinois Brick Co. et al.** *v.* **Illinois et al.** C. A. 7th Cir. [Certiorari granted, *ante*, p. 938.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose. Counsel for petitioners allotted an additional 15 minutes for oral argument. Motion of the State of Alabama et al. for leave to participate in oral argument as *amici curiae* denied.

No. 76–815. **Appawora** *v.* **Brough.** Appeal from Sup. Ct. Utah;

No. 76–900. **Erie Lackawanna Railway Co.** *v.* **Cole.** C. A. 6th Cir.; and

No. 76–5729. **Oliphant et al.** *v.* **Suquamish Indian Tribe et al.**; and **Belgarde** *v.* **Suquamish Indian Tribe et al.** Petition for certiorari before judgment to C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 76-447. Milliken, Governor of Michigan, et al. *v.* Bradley et al. C. A. 6th Cir. [Certiorari granted, *ante*, p. 958.] Motion of the National Association of Attorneys General for leave to join the *amicus curiae* brief filed by the Commonwealth of Pennsylvania denied.

No. 76-1105. Clark *v.* Valeo, Secretary of the Senate, et al. Appeal from C. A. D. C. Cir. Motion to expedite consideration denied.

No. 76-5187. Lee *v.* United States. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1037.] Motion for appointment of counsel granted, and it is ordered that Conrad Kellenberg, Esquire, of Notre Dame, Ind., is appointed to serve as counsel for petitioner in this case.

No. 76-803. Vesco & Co., Inc. *v.* International Controls Corp. Motion for leave to file petition for writ of certiorari and other relief denied.

No. 76-5896. Diamond *v.* Alabama. Motion for leave to file petition for writ of certiorari denied.

No. 76-5778. Gamble *v.* Alabama; and
No. 76-6040. Clark *v.* Malley, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

No. 76-6102. McDonald *v.* Thompson, Warden. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 76-5996. Loden *v.* Cunningham, Clerk, U. S. District Court for the Northern District of Illinois, et al. Motion for leave to file petition for writ of mandamus denied.

*Probable Jurisdiction Noted or Postponed*

No. 76-635. United States Steel Corp. et al. *v.* Multistate Tax Commission et al. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 417 F. Supp. 795.

No. 76-879. **Zablocki, Milwaukee County Clerk** *v.* **Redhail.** Appeal from D. C. E. D. Wis. Probable jurisdiction noted. Reported below: 418 F. Supp. 1061.

No. 76-860. **Califano, Secretary of Health, Education, and Welfare** *v.* **Jobst.** Appeal from D. C. W. D. Mo. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: See 368 F. Supp. 909.

No. 76-5528. **Baldwin et al.** *v.* **Fish and Game Commission of Montana et al.** Appeal from D. C. Mont. Motion of appellants for leave to proceed *in forma pauperis* denied. Appellants now having paid the docket fee pursuant to this Court's Rule 52, case is transferred to the appellate docket as No. 76-1150. Probable jurisdiction noted. Reported below: 417 F. Supp. 1005.

No. 76-616. **New York** *v.* **Cathedral Academy.** Appeal from Ct. App. N. Y. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 39 N. Y. 2d 1021, 355 N. E. 2d 300.

*Certiorari Granted*

No. 76-624. **Frank Lyon Co.** *v.* **United States.** C. A. 8th Cir. Certiorari granted. Reported below: 536 F. 2d 746.

No. 76-678. **Shell Oil Co.** *v.* **Dartt.** C. A. 10th Cir. Certiorari granted. Reported below: 539 F. 2d 1256.

No. 76-709. **Butz et al.** *v.* **Economou et al.** C. A. 2d Cir. Certiorari granted. Reported below: 535 F. 2d 688.

No. 76-719. **National Labor Relations Board** *v.* **Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, et al.** C. A. D. C. Cir. Certiorari granted. Reported below: 175 U. S. App. D. C. 259, 535 F. 2d 87.

No. 76-811. Regents of the University of California v. Bakke. Sup. Ct. Cal. Certiorari granted. Reported below: 18 Cal. 3d 34, 553 P. 2d 1152.

No. 76-906. United Air Lines, Inc. v. McMann. C. A. 4th Cir. Certiorari granted. Reported below: 542 F. 2d 217.

No. 76-39. Memphis Light, Gas & Water Division et al. v. Craft et al. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 534 F. 2d 684.

No. 76-419. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., et al.; and

No. 76-528. Consumers Power Co. v. Aeschliman et al. C. A. D. C. Cir. Motion of Edison Electric Institute et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Mr. Justice Powell took no part in the consideration or decision of the motion and petitions. Reported below: No. 76-419, 178 U. S. App. D. C. 336, 547 F. 2d 633; No. 76-528, 178 U. S. App. D. C. 325, 547 F. 2d 622.

*Certiorari Denied.* (See also Nos. 76-805, 76-821, 76-823, 76-862, 76-888, and 76-5951, *supra*.)

No. 75-770. Treadway Companies, Inc., et al. v. Brunswick Corp. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 262.

No. 75-836. Valley Distributing Co. v. Davis et al. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 2d 827.

No. 76-273. Davis v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 1134.

No. 76-384. Simon v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1142.

No. 76-449. **Persico** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 316.

No. 76-465. **City of Alexandria** *v.* **United States et al.**; and

No. 76-476. **Robinson Terminal Warehouse Corp. et al.** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 152, 543 F. 2d 299.

No. 76-480. **Robertson** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 898.

No. 76-486. **De Lutro** *v.* **United States;**
No. 76-612. **Soldano** *v.* **United States;**
No. 76-640. **Lucas** *v.* **United States;**
No. 76-5503. **Bolella** *v.* **United States;** and
No. 76-5603. **Magnano et al.** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 431.

No. 76-503. **Matya et al.** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 741.

No. 76-523. **Church of Scientology of California** *v.* **Allard.** Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 58 Cal. App. 3d 439, 129 Cal. Rptr. 797.

No. 76-526. **First National Bank of Fort Collins** *v.* **State Banking Board of Colorado et al.** C. A. 10th Cir. Certiorari denied. Reported below: 540 F. 2d 497.

No. 76-561. **Berrada** *v.* **United States;**
No. 76-5565. **Contreras** *v.* **United States;** and
No. 76-5573. **Di Giso** *v.* **United States.** C. A. 2d Cir. Certiorari denied.

No. 76-567. **West Penn Power Co.** *v.* **Train, Administrator, Environmental Protection Agency.** C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 2d 1020.

No. 76-587. Gibbons, Trustee *v.* Atchison, Topeka & Santa Fe Railway Co. et al. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 2d 906.

No. 76-590. Shuey *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 845.

No. 76-621. Nowicki, dba K & F Food Market *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 536 F. 2d 1171.

No. 76-634. Manning *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 685.

No. 76-657. Newspaper Guild *v.* Bell, Attorney General. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 276, 539 F. 2d 755.

No. 76-665. Ernest *v.* Carter, President of the United States, et al. C. A. D. C. Cir. Certiorari denied.

No. 76-681. National Bank of Northern New York, Executor *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 540 F. 2d 579.

No. 76-683. Western Union Telegraph Co. *v.* Federal Communications Commission et al. C. A. 3d Cir. Certiorari denied. Reported below: 541 F. 2d 346.

No. 76-687. Camenisch et al. *v.* United States et al. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 240, 539 F. 2d 242.

No. 76-692. Campisi *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 415.

No. 76-701. Brennan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 711.

No. 76-707. Sumter Plywood Corp. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 917.

No. 76-711. FELICIANO ET AL. *v.* UNITED STATES;

No. 76-5691. IACONA *v.* UNITED STATES; and

No. 76-5715. BISHOP ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 156.

No. 76-715. VAN WINKLE *v.* MCLUCAS, SECRETARY OF THE AIR FORCE. C. A. 6th Cir. Certiorari denied. Reported below: 537 F. 2d 246.

No. 76-727. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 710.

No. 76-741. HUNTER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 290 N. C. 556, 227 S. E. 2d 535.

No. 76-746. GRAVES ET AL. *v.* SNEED ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 541 F. 2d 159.

No. 76-755. DEMA *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 1373.

No. 76-758. SINK *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76-759. KINTY, DBA KINTY TRUCKING CO., ET AL. *v.* UNITED MINE WORKERS OF AMERICA; and

No. 76-945. UNITED MINE WORKERS OF AMERICA *v.* KINTY, DBA KINTY TRUCKING CO., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 706.

No. 76-760. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 16.

No. 76-763. CAMELIA BUILDERS, INC., ET AL. *v.* FIDELITY MORTGAGE INVESTORS. C. A. 2d Cir. Certiorari denied.

No. 76-765. URDA *v.* PENNSYLVANIA FARVIEW STATE HOSPITAL. Sup. Ct. Pa. Certiorari denied. Reported below: See 23 Pa. Commw. 607, 353 A. 2d 61.

No. 76-766. Yoder Bros., Inc. *v.* California-Florida Plant Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 537 F 2d 1347.

No. 76-767. Fried *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76-775. Royal Indemnity Co. *v.* Prince et al., Trustees. C. A. 7th Cir. Certiorari denied. Reported below: 541 F. 2d 646.

No. 76-779. City of Euclid *v.* Fitzthum et al. Sup. Ct. Ohio. Certiorari denied.

No. 76-780. Kelsie *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 265 Ind. 363, 354 N. E. 2d 219.

No. 76-782. Great Western Sugar Co. *v.* Davis Cattle Co., Inc. C. A. 10th Cir. Certiorari denied. Reported below: 544 F. 2d 436.

No. 76-788. Howland et al. *v.* City of Monterey et al. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 336.

No. 76-791. Jacobs et al. *v.* Kunes, County Assessor of Maricopa County, et al. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 222.

No. 76-792. Glenview Park District *v.* Melhus. C. A. 7th Cir. Certiorari denied. Reported below: 540 F. 2d 1321.

No. 76-796. Mississippi Power & Light Co. *v.* United Gas Pipe Line Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 412.

No. 76-797. Rural Foods, Inc., t/a Shop & Save Super Markets *v.* United States Department of Agriculture. C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 2d 277.

No. 76–798. A. H. Robins Co., Inc. *v.* Department of Health of California et al. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 59 Cal. App. 3d 903, 130 Cal. Rptr. 901.

No. 76–806. Texas Steel Co. *v.* International Association of Machinists & Aerospace Workers, District 776. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 1116.

No. 76–810. McGraw *v.* Berger, Commissioner, Department of Social Services of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 719.

No. 76–813. Benson *v.* Metro-Goldwyn-Mayer, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 334.

No. 76–828. Markle Manufacturing Co. *v.* International Union of Electrical, Radio & Machine Workers, AFL–CIO–CLC, et al. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 388.

No. 76–829. Cataldo *v.* Buglass et al. Ct. App. N. Y. Certiorari denied. Reported below: 39 N. Y. 2d 807, 351 N. E. 2d 428.

No. 76–833. Morrow *v.* Greyhound Lines, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 418.

No. 76–837. Bradco Oil & Gas Co. *v.* Youngstown Sheet & Tube Co. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 501.

No. 76–841. Illinois et al. *v.* Consolidated Rail Corp. et al. Sp. Ct., R. Reorg. Act. Certiorari denied. Reported below: 423 F. Supp. 941.

No. 76–844. Snyder *v.* R. I. D. C. Industrial Development Fund. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 487.

No. 76-845. Gilinsky *v.* Columbia University et al. Ct. App. N. Y. Certiorari denied. Reported below: 39 N. Y. 2d 612, 350 N. E. 2d 396.

No. 76-848. McClendon et al. *v.* Slater, Secretary, State Election Board, et al. Sup. Ct. Okla. Certiorari denied. Reported below: 554 P. 2d 774.

No. 76-849. Woodmar Realty Corp. et al. *v.* Samuel C. Ennis & Co., Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 542 F. 2d 45.

No. 76-850. Black Musicians of Pittsburgh et al. *v.* Local 60-471, American Federation of Musicians, AFL-CIO, et al. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 512.

No. 76-856. Southern Concrete Co. *v.* United States Steel Corp. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 313.

No. 76-872. Burroughs *v.* Board of Trustees of the Pension Trust Fund for Operating Engineers et al.; and

No. 76-912. Board of Trustees of the Pension Trust Fund for Operating Engineers *v.* Burroughs et al. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1128.

No. 76-873. Arthur Andersen & Co. *v.* Ohio et al. C. A. 10th Cir. Certiorari denied. Reported below: 546 F. 2d 338.

No. 76-875. Ratliff et al. *v.* Lexington-Fayette Urban County Government. Sup. Ct. Ky. Certiorari denied. Reported below: 540 S. W. 2d 8.

No. 76-882. Cogdell *v.* Fort Worth National Bank, Trustee. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 536 S. W. 2d 257.

No. 76-883. Dodson *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 237 Ga. 607, 229 S. E. 2d 364.

No. 76-885. Spillman *v.* City of Dallas. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 535 S. W. 2d 717.

No. 76-887. Camil *v.* Superior Court of California, County of Los Angeles (Buena Vista Cinema et al., Real Parties in Interest). Ct. App. Cal., 2d App Dist. Certiorari denied.

No. 76-890. Hesler et al. *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 39 Ill. App. 3d 843, 350 N. E. 2d 748.

No. 76-891. Chambers *v.* Chambers et al. Sup. Ct. Tex. Certiorari denied.

No. 76-894. Schott et al. *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 39 Ill. App. 3d 266, 350 N. E. 2d 49.

No. 76-899. McGraw-Edison Co. *v.* Soper et al. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1336.

No. 76-901. Doe *v.* Lamb, Sheriff, et al. Sup. Ct. Nev. Certiorari denied. Reported below: 92 Nev. 550, 554 P. 2d 732.

No. 76-903. Feist et al. *v.* Luzerne County Board of Assessment Appeals. Sup. Ct. Pa. Certiorari denied. Reported below: See 22 Pa. Commw. 181, 347 A. 2d 772.

No. 76-904. FLM Collision Parts, Inc. *v.* Ford Motor Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 1019.

No. 76-907. Compania Maritima San Basilio, S. A., et al. *v.* Antypas. C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 2d 307.

No. 76-916. Schwartz *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 64 Ill. 2d 275, 356 N. E. 2d 8.

No. 76-920. Anuszewski et al. *v.* Dynamic Mariners Corp., Panama. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 2d 757.

No. 76-925. Ferren *v.* Ferren. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-927. Rifkin *v.* United States. Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 566, — F. 2d —.

No. 76-940. Zemprelli *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 76-942. Anthony *v.* Anthony. Sup. Ct. Ga. Certiorari denied. Reported below: 237 Ga. 753, 229 S. E. 2d 609.

No. 76-963. Largent et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 545 F. 2d 1039.

No. 76-1000. Fife *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 76-1007. Seligman Development, Inc., et al. *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 76-1009. Zemprelli *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1166.

No. 76-1019. Afflerbach *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 547 F. 2d 522.

No. 76-1032. Wood *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 1124.

No. 76-5296. **Inciso** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 353.

No. 76-5341. **McCurry** *v.* **Clerk of the Sixth Judicial District Court of Louisiana.** C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 184.

No. 76-5357. **Cooper** *v.* **United States;**
No. 76-5360. **Escamilla** *v.* **United States;** and
No. 76-5367. **Alvarado et al.** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 770.

No. 76-5370. **Mitchell** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 540 F. 2d 1163.

No. 76-5464. **Lupo** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 389.

No. 76-5465. **Hairston** *v.* **Warden, Illinois State Penitentiary.** C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 713.

No. 76-5475. **Sypula** *v.* **United States** C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1168.

No. 76-5482. **Starr** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 76-5490. **Miller** *v.* **Texas.** Ct. Crim. App. Tex. Certiorari denied. Reported below: 537 S. W. 2d 725.

No. 76-5507. **Toon** *v.* **United States.** Ct. App. D. C. Certiorari denied. Reported below: 364 A. 2d 1177.

No. 76-5520. **Chester** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 173.

No. 76-5526. **Woods** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 288.

No. 76-5527. **Boyd** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 2d 1269.

No. 76-5540. Williams *v.* Alabama. C. A. 5th Cir. Certiorari denied.

No. 76-5546. Melian *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 323 So. 2d 289.

No. 76-5554. Rua *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 76-5557. Gorham *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1168.

No. 76-5569. Teri *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 2d 158.

No. 76-5570. Brown *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 540 F. 2d 1048.

No. 76-5571. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 74.

No. 76-5574. Cavazos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1405.

No. 76-5579. Mitchell *v.* LaVallee, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 76-5580. Fields *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-5582. Miller *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 406.

No. 76-5585. Shryock *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 207.

No. 76-5587. Mercer *v.* United States. Ct. App. D. C. Certiorari denied.

No. 76-5589. Belvin *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 1335.

No. 76-5590. Brown *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-5591. Liganoza *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 58.

No. 76-5594. Gatt *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5596. Highfield et al. *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5600. Evans et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 805.

No. 76-5607. Robinson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 539 F. 2d 1181.

No. 76-5612. Kurowski *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 519.

No. 76-5614. Campbell *v.* Attorney General of the United States. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 711.

No. 76-5615. Clark *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76-5616. Jones et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 540 F. 2d 465.

No. 76-5622. Flores-Amaya *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 188.

No. 76-5635. Hannah *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 336 So. 2d 1317.

No. 76-5637. Miller *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 76-5638. Carrington *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76-5640. NASIM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 76-5642. BIBBS *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 2d 151.

No. 76-5643. ST. JOHN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76-5646. MINNS *v.* PAUL. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 899.

No. 76-5648. WILSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 29 Md. App. 97, 349 A. 2d 414.

No. 76-5654. SCHUER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 715.

No. 76-5656. CAMPISE *v.* HAMILTON, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 279.

No. 76-5657. DOE *v.* AFL-CIO, DEPARTMENT OF ORGANIZATION, REGION 6, ATLANTA, GA. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1141.

No. 76-5658. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 527.

No. 76-5659. BOSCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 513.

No. 76-5660. HENKIN *v.* UNITED STATES; and
No. 76-5786. ABRAHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 541 F. 2d 1234.

No. 76-5662. COX *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76-5664. **Anatala** *v.* **United States**; and

No. 76-5667. **Panebianco** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 447.

No. 76-5671. **Whitaker** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 280.

No. 76-5675. **Norton** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 1082.

No. 76-5682. **Lanier** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76-5684. **O'Dell** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 1176.

No. 76-5687. **Schreter** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 709.

No. 76-5688. **Scully** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 1370.

No. 76-5699. **Grant** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 1309.

No. 76-5700. **Childers** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76-5701. **Ives** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1100.

No. 76-5705. **Engelfried et al.** *v.* **Aytch et al.** C. A. 3d Cir. Certiorari denied. Reported below: 539 F. 2d 297.

No. 76-5709. **Payne** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 443.

No. 76-5710. **Moore** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76-5713. **De La O** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 898.

No. 76-5721. **Kelley** *v.* **City of Cincinnati.** Sup. Ct. Ohio. Certiorari denied. Reported below: 47 Ohio St. 2d 94, 351 N. E. 2d 85.

No. 76-5725. **Davis** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 521.

No. 76-5726. **Auler** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 642.

No. 76-5727. **Gardner** *v.* **United States.** C. A. 2d Cir. Certiorari denied.

No. 76-5732. **Marino** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 417.

No. 76-5734. **Trowery** *v.* **United States.** C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 623.

No. 76-5736. **Stevens** *v.* **New York.** App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 51 App. Div. 2d 892, 379 N. Y. S. 2d 211.

No. 76-5743. **Munz** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 1382.

No. 76-5756. **Nolen** *v.* **Brown, Secretary of Defense, et al.** C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 890.

No. 76-5757. **Nolen** *v.* **Brown, Secretary of Defense.** C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 888.

No. 76-5775. **Rodriquez** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 521.

No. 76-5789. **Dinitz** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 1214.

No. 76-5804. **Darnell** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 595.

No. 76-5810. SCHMITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 782.

No. 76-5836. WILSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76-5837. MARTINEZ *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 76-5838. GREENFIELD *v.* TIBBETTS. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-5839. WYCOFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 679.

No. 76-5840. TREADWELL *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1385.

No. 76-5842. RICHISON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 76-5845. WEINER *v.* UNITED STATES; and
No. 76-5851. SHINNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76-5847. CRAYTON *v.* UNITED STATES POSTAL SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 604.

No. 76-5848. HOLLAND, ADMINISTRATRIX *v.* ALLIED STRUCTURAL STEEL CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 476.

No. 76-5850. DETWILER *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 512.

No. 76-5855. JACKSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76-5858. NOBLE *v.* BLACK, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 539 F. 2d 586.

No. 76-5859. Houlf *v.* Arizona. Ct. App. Ariz. Certiorari denied. Reported below: 27 Ariz. App. 633, 557 P. 2d 565.

No. 76-5866. Salter et ux. *v.* Ohio. Ct. App. Ohio, Ashtabula County. Certiorari denied.

No. 76-5869. McDonough *v.* Maryland et al. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 1169.

No. 76-5870. Martin *v.* Morris, Secretary, Department of Social and Health Services of Washington. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1179.

No. 76-5871. Villafane *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 171 Conn. 644, 372 A. 2d 82.

No. 76-5872. Mauch *v.* Michigan Department of Corrections. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76-5873. Lincoln *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 746.

No. 76-5874. Simms *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 38 Ill. App. 3d 703, 348 N. E. 2d 478.

No. 76-5875. Bendter *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 76-5878. Johnson *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76-5891. Campbell *v.* Safeco Insurance Company of America et al. C. A. 9th Cir. Certiorari denied.

No. 76-5892. Jones *v.* Members of the Board of Directors et al. C. A. 8th Cir. Certiorari denied.

No. 76-5895. Ramsay *v.* Bailey et al. C. A. 5th Cir. Certiorari denied. Reported below: 531 F. 2d 706.

No. 76-5899. Stebbins *v.* Continental Insurance Companies et al. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 77, 543 F. 2d 1390.

No. 76-5901. McClintock *v.* Ohio. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 76-5902. McDonough *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 1169.

No. 76-5905. Warne *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 39 Ill. App. 3d 894, 350 N. E. 2d 836.

No. 76-5906. Kyle *v.* Kyle. Super. Ct. Pa. Certiorari denied. Reported below: 241 Pa. Super. 598, 360 A. 2d 628.

No. 76-5909. Moore *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 180.

No. 76-5916. Strzyzewski *v.* Ohio. Ct. App. Ohio, Medina County. Certiorari denied.

No. 76-5921. Chambers *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 539 F. 2d 667.

No. 76-5922. Campbell *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 341 So. 2d 1080.

No. 76-5923. Lane *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 523.

No. 76-5924. Bressler *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76-5928. Williams *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 39 Ill. App. 3d 449, 350 N. E. 2d 135.

No. 76-5927. **Myers** *v.* **Arizona.** Ct. App. Ariz. Certiorari denied.

No. 76-5930. **Parrott** *v.* **Government of the Virgin Islands.** C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1160.

No. 76-5932. **Handy** *v.* **Maryland.** C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 514.

No. 76-5937. **Moore** *v.* **Hewitt, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 421.

No. 76-5938. **Richey** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 1177.

No. 76-5941. **Miller** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 2d 1221.

No. 76-5945. **Sanders** *v.* **Michigan.** Sup. Ct. Mich. Certiorari denied. Reported below: 395 Mich. 96, 235 N. W. 2d 132.

No. 76-5946. **Mata** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76-5948. **Filion** *v.* **New York.** App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 2d 624, 387 N. Y. S. 2d 397.

No. 76-5949. **Miller** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 1171.

No. 76-5952. **Owens** *v.* **Illinois.** App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 36 Ill. App. 3d 1049, 344 N. E. 2d 525.

No. 76-5953. **Dreding** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 471.

No. 76-5954. GIBSON ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 36 Ill. App. 3d 695, 344 N. E. 2d 641.

No. 76-5956. JOHNSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 76-5961. LODER *v.* MUNICIPAL COURT FOR THE SAN DIEGO JUDICIAL DISTRICT OF SAN DIEGO COUNTY ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 17 Cal. 3d 859, 553 P. 2d 624.

No. 76-5962. SALAZAR-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76-5964. MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76-5966. VARGAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 542 S. W. 2d 151.

No. 76-5968. MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 553.

No. 76-5971. FAHRIG ET AL. *v.* LECOMPTE. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 76-5973. GOLDSTEIN *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 76-5976. ROBERTSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 2d 608.

No. 76-5983. FOLKS *v.* SMATHERS, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 76-5986. DONNER *v.* BILL SEIDEL'S DATSUN, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 897.

No. 76-5988. BOIGNER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 76-5992. **Bankhead** *v.* **Slazas et al.** C. A. 2d Cir. Certiorari denied.

No. 76-5995. **Eagle** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 539 F. 2d 1166.

No. 76-5997. **Thomas** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76-5998. **Cook** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76-6001. **Newman** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76-6021. **Nixon** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76-6023. **Phipps** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 576.

No. 76-6025. **Smith** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 1141.

No. 76-6028. **Kalama** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 594.

No. 76-6029. **Robin** *v.* **United States et al.** C. A. 10th Cir. Certiorari denied.

No. 76-6033. **Monin** *v.* **United States.** C. A. 2d Cir. Certiorari denied.

No. 76-6037. **Reed** *v.* **Del Chemical Corp.** Ct. App. Ore. Certiorari denied. Reported below: 26 Ore. App. 733, 554 P. 2d 586.

No. 76-6046. **Donohue** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 526.

No. 76-6052. **Nixon** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 1190.

No. 76-6054. Rose *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76-6062. Matthews *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76-6072. Trolley *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 428.

No. 76-6073. Scott *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 1116.

No. 76-6083. Brashier *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 1315.

No. 76-6087. Zamarripa *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 544 F. 2d 978.

No. 76-6094. Lewis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1030.

No. 76-6095. Buford *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 719.

No. 76-6100. Brown *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76-6111. Lopez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 1156.

No. 75-1763. Gunn, Warden *v.* Sesser. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 529 F. 2d 932.

No. 75-6898. Freeman *v.* Zahradnick, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

Mr. Justice Stewart, dissenting.

Mr. Justice Marshall's dissent from the denial of certiorari expresses "grave doubts" that there was any evidence at all to support the petitioner's conviction. Although unable to accept the view that this conviction is susceptible of challenge under the "no evidence" rule of *Thompson* v. *City of*

*Louisville*, 362 U. S. 199, I would grant certiorari to reconsider the doctrine of the *Thompson* case in the light of this Court's more recent decision in *In re Winship*, 397 U. S. 358.

The *Winship* case held that the Due Process Clause requires proof beyond a reasonable doubt of every element of a criminal offense. A jury must be instructed accordingly. Properly instructed juries, however, occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt—even when it is clear that the defendant was entitled to a directed verdict of acquittal as a matter of law. In a federal trial, such improper application of law (as defined by *Winship*) to fact requires reversal of the conviction on the ground of insufficient evidence.

The power of a federal court to review the application of federal law to the facts as found also operates, however, in criminal cases originating in state courts. On direct review of a state-court conviction, this Court reviews the application of the "voluntariness" standard to the historical facts to determine whether a confession was admissible,[1] or the application of First Amendment standards to the facts as found to determine whether the conduct in issue was constitutionally protected,[2] to take but two examples. The same rule is applied in federal habeas corpus actions. See generally *Townsend* v. *Sain*, 372 U. S. 293, 318; *Brown* v. *Allen*, 344 U. S. 443, 506–507 (opinion of Frankfurter, J.). It is not immediately apparent why application of the beyond-a-reasonable-doubt standard of *Winship* to the historical facts should be any more immune from constitutional scrutiny. If, after viewing the evidence in the light most favorable to the State, cf. *Glasser* v. *United States*, 315 U. S. 60, 80, a federal court determines that no rational trier of fact could have found a defendant guilty beyond a reasonable doubt of the state offense with which he was charged, it is surely arguable that the court must hold, under *Winship,* that the convicted defendant was denied due process of law.

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[1] *E. g., Haynes* v. *Washington*, 373 U. S. 503, 515–516; *Watts* v. *Indiana*, 338 U. S. 49, 50–52 (opinion of Frankfurter, J.).

[2] *E. g., Fiske* v. *Kansas*, 274 U. S. 380.

What I am suggesting is simply that the question whether there was sufficient evidence to support a finding by a rational trier of fact of guilt beyond a reasonable doubt may be of constitutional dimension. Such a view would not require federal courts to second-guess state-court findings of fact or a State's definition of the elements of a crime.[3] Rather, the federal courts would no more than perform a familiar and appropriate role—reviewing the *application* of a substantive federal standard (the requirement of proof beyond a reasonable doubt) to the historical facts.

The Court's decision in *United States* v. *Romano,* 382 U. S. 136, provides support for the approach I have described. *Romano* held that it was a violation of due process to instruct a jury that presence of a defendant at the site of an illegal still " 'shall be deemed sufficient evidence to authorize conviction [of possession of the still].' " *Id.,* at 138. The Court disapproved that instruction because no rational jury could infer possession simply from the fact of presence. And in doing so, it relied upon the decision in *Bozza* v. *United States,* 330 U. S. 160, that presence alone was *insufficient evidence* to convict of possession. See 382 U. S., at 140–144. It seems to me that whether the jury has been expressly instructed that it could (though need not) make an irrational inference—as in *Romano*—or simply does so on its own—as in *Bozza*—is probably of no consequence. A jury that convicts in either case would appear to be acting equally irrationally and equally in derogation of the Due Process Clause's requirement of proof beyond a reasonable doubt.

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[3] A State does not have total freedom in this regard, however. It may not characterize a fact which in substance is an element of the offense as an affirmative defense, *Mullaney* v. *Wilbur,* 421 U. S. 684, and a state court may not adopt a construction of an offense that fails to give fair warning that certain conduct is deemed criminal, *Bouie* v. *City of Columbia,* 378 U. S. 347.

The Court said in *Thompson* v. *City of Louisville* that the question in that case turned "not on the sufficiency of the evidence, but on whether [the] conviction rests upon any evidence at all." 362 U. S. 199; accord, *Garner* v. *Louisiana*, 368 U. S. 157, 163; *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 94. But the logical application of the "no evidence" doctrine is not an easy matter. "[A] mere modicum of evidence may satisfy a 'no evidence' standard . . . ." *Jacobellis* v. *Ohio*, 378 U. S. 184, 202 (Warren, C. J., dissenting). Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be thought to be a "mere modicum." Evidence that a defendant is a narcotics addict makes it more likely that he has stolen property (to finance his habit) than it would be without such evidence. Can it therefore be said that there is "some evidence" that the addict is a thief? If not, can any definable content be discerned in the "no evidence" rule? Indeed, in the *Thompson* case itself, could it fairly have been said that the mere fact that the defendant was found in a café, rather than home in bed, was *some* relevant evidence that he was guilty of loitering and disorderly conduct?

My tentative view is that where the evidence falls far short of supplying adequate proof of guilt for a rational trier, to require judges to determine how speculative is too speculative to satisfy the no-evidence rule is to require the impossible. The ordinary standard of "sufficiency of the evidence," by contrast, is one familiar to state and federal judges and lawyers. Although like most legal standards it is not reducible to any mechanical formula, it does have a stable content permitting predictable adjudication.

A sufficiency standard would not only be more certain in application, but also far truer to the constitutional rationale of *Winship.* For the law as it now stands—with only the *Thompson* rule in force—can lead to bizarre results. Defendant A, whose guilt is conclusively established by 20 eyewitnesses, clear fingerprints, and an unimpeachable confession, is denied due process if the jury is instructed that he can be found guilty by a preponderance of the evidence; that much is clear from *Winship.* Defendant B, against whom there is but one flimsy piece of evidence—which falls far short of sufficiency to prove guilt beyond a reasonable doubt but barely meets the "greater than zero" test of the no-evidence rule—is not denied due process so long as the instructions are proper. Clearly, however, defendant B is much more likely to be innocent than defendant A. That pair of results could well be thought to be at war with the purpose of the *Winship* decision—to reduce "the risk of convictions resting on factual error," to provide "concrete substance for the presumption of innocence," 397 U. S., at 363, and to ensure that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, at 364.

The approach I suggest would expand the contours of one kind of claim cognizable on federal habeas corpus. But if such an approach is constitutionally required, a federal habeas court asked to determine whether the evidence in a state prosecution was sufficient would be discharging the principal function underlying its jurisdiction—determining whether a defendant's custody is in violation of federal constitutional law. And the question whether a defendant has been convicted without sufficient evidence is hardly irrelevant to innocence. Cf. *Stone* v. *Powell,* 428 U. S. 465. Indeed, an affirmative answer to this question means not merely that a defendant *might have been,* but that he *was in fact* improperly convicted.[4]

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[4] The burden that would be imposed on federal habeas courts by adoption of a sufficiency standard is not, of course, the critical inquiry in de-

On the evidence in this case as summarized in MR. JUSTICE MARSHALL's opinion, I think a rational jury could not have found beyond a reasonable doubt that the petitioner was in possession of the shotgun, as that offense is defined by the State—that he exercised, alone or jointly, ownership, possession, or control.[5] To address the question whether it violates the Due Process Clause of the Fourteenth Amendment for a state trier of fact to convict a defendant where the evidence cannot fairly be considered sufficient to establish guilt beyond a reasonable doubt, I would grant certiorari.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted in the Circuit Court for Surry County, Va., of unlawfully possessing a sawed-off shotgun for an aggressive purpose. Va. Code. Ann. § 18.1-268.3 (Supp. 1971), now § 18.2-301 (1975). He received a mandatory minimum sentence of 10 years' imprisonment. After exhausting his state remedies, he filed this federal habeas corpus action. The District Court granted relief, but a divided Court of Appeals reversed.

The shotgun petitioner was convicted of possessing was

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termining whether that standard is constitutionally required. I would note, however, that that burden is easily exaggerated. State courts would filter out most meritorious claims and in many cases would provide opinions thoroughly analyzing the question; few of the claims that remained would be likely to present difficult questions on the merits, and they could in any event be judged against the written record without the need for an evidentiary hearing.

[5] The jury instructions were not transcribed, but the record includes a typed instruction on possession, with the word "granted" written in ink at the bottom. That instruction defines "possession" as "single or joint ownership, possession, or control." Neither the Virginia Supreme Court in refusing to review the conviction, nor the respondent in his brief in opposition to certiorari, has questioned this definition of possession, and it appears to be consistent with Virginia law, cf. *Ritter* v. *Commonwealth,* 210 Va. 732, 741, 173 S. E. 2d 799, 805-806 (1970).

found in a leather case in the locked trunk of a car rented by one Coyle Persons. At the time the shotgun was found, the car was at a garage, having been towed there following an accident. The Commonwealth offered circumstantial evidence tending to prove that petitioner, along with three other Negro men, had been riding in the car at the time of the accident.[1] To link petitioner more directly to the shotgun in the trunk, the prosecution attempted to establish that two hours earlier these men had participated in a robbery, and that all but $700 of the proceeds of the robbery had been placed in the body and trunk of the car.[2] The robbery victim convincingly identified the money found in the car as having come from his store.[3] But the victim testified that only three robbers had entered the store, and he was unable to identify petitioner as one of them. It was undisputed that petitioner was not driving the car at the time of the accident. The only evidence tying petitioner to the robbery, then, aside from his presence in the car with the proceeds two hours after the crime, came from a nurse who worked at the second hospital to which petitioner was taken after the accident.[4] She testified that she had found $600 in a pair of pants that she had been told belonged to petitioner.[5]

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[1] The first witness at the scene of the accident testified that he saw three black men in one car, a white man and white woman in a second car, and a fourth black man on the ground. The Commonwealth all but ruled out the possibility that petitioner was the man on the ground by showing that the second witness at the scene administered first aid to a man on the ground at the same time that a state trooper was administering aid to petitioner.

[2] The shotgun apparently was not used in the robbery; an automatic pistol was used and such a pistol also was found in the trunk.

[3] The state trooper who searched the car testified that the had found a large number of coins, some of which were rolled in paper wrappers; some bills and bus tokens; an envelope with handwriting on it; two books of bus passes, one of which had two passes missing; and a cloth United States Mint bag. The victim of the robbery identified the envelope and Mint bag, and indicated that the rest of what was found closely corresponded with what was taken.

The petition for certiorari raises two issues. First, petitioner contends that his conviction and confinement on the basis of the meager evidence produced at trial violates the Due Process Clause. Second, petitioner claims that his Sixth Amendment right to confront his accusers was infringed by the admission of the nurse's testimony identifying the pants. The Court of Appeals rejected petitioner's first contention without explanation, and did not reach the second.

I entertain grave doubts as to whether the Commonwealth produced any evidence, cf. *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960), that petitioner possessed the shotgun.[6] Even if the Commonwealth had conclusively proved that petitioner had robbed the store and had placed the proceeds in the trunk, this would not establish that petitioner had even seen the leather case or knew that it contained a shotgun, let alone that petitioner was exercising dominion or control over the shotgun. The Court of Appeals' conclusory assertion to the contrary is hardly reassuring.

But if it were conceded that proof of petitioner's participation in the robbery whose proceeds were found in the trunk established petitioner's guilt of possession of the shotgun, then it is clear that the nurse's testimony identifying the pants with the $600 as petitioner's deprived petitioner of his right of confrontation. The nurse was essentially repeating the statement of an anonymous declarant. That person was not subjected to cross-examination at trial or at the time the statement first was made. Cf. *California* v. *Green,* 399 U. S. 149, 153–168 (1970). The declarant was not even identified so that petitioner could have called him or her as a witness. Cf. *Dutton* v. *Evans,* 400 U. S. 74, 88 n. 19 (1970).[7] There were no indicia of reliability surrounding the out-of-court statement, cf. *Mancusi* v. *Stubbs,* 408 U. S. 204, 213–216 (1972); to the contrary, in the rush to get six injured persons to the hospital, and then to transfer them to at least three other hospitals, it is altogether possible that the unidentified declarant became confused as to which clothes belonged to which person. Finally, the out-of-court statement provided a far from "peripheral" link in tying petitioner to the robbery. Cf. *Dutton* v. *Evans, supra,* at 87–88. Thus, no matter how the Confrontation Clause is construed, compare *id.,* at 80–90 (plurality opinion of STEWART, J.), with *id.,* at 100–111 (MARSHALL, J., dissenting), it was violated in this case.

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[4] All the victims were taken to the same hospital following the accident. Four or five of them were transferred to other hospitals within a few hours.

[5] The nurse also found a pair of ladies' gloves, two keys, and a piece of paper with an address on it in the pants pocket.

[6] At the same time, I find myself at least tentatively persuaded by MR. JUSTICE STEWART's argument that the Due Process Clause is violated by convictions not supported by evidence that can fairly be considered sufficient to establish guilt beyond a reasonable doubt. I therefore agree that certiorari should be granted to decide this issue.

The Court of Appeals justified its decision not to determine whether petitioner's right of confrontation had been infringed on the ground that in any event there was some evidence of guilt. But that is entirely irrelevant. Once an independent constitutional error is established, the remaining question is not whether there is some evidence, but whether the evidence is such that the error was "harmless beyond a reasonable doubt." *Chapman* v. *California,* 386

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[7] The ambulance attendant who transferred petitioner to the second hospital did testify that he had carried with him clothes that he believed belonged to petitioner, and had given them to a nurse. The attendant did not name the nurse, however, nor did he indicate what, if anything, he said to her. But even if the attendant were the source of the testimony identifying the pants, the Confrontation Clause problem would remain, since the attendant's testimony makes clear that he did not have firsthand knowledge as to the ownership of the clothes.

U. S. 18, 24 (1967). This the Court of Appeals failed to consider.

The Court's decision to deny certiorari is puzzling, to say the least. I can understand, if not agree with, the Court's apparent unwillingness to decide the relatively narrow question of whether the Court of Appeals correctly applied *Thompson* v. *City of Louisville, supra.* But I cannot comprehend the Court's refusal to consider the novel and important issue of constitutional law that MR. JUSTICE STEWART raises in his dissent. And I am positively baffled by the Court's failure to at least vacate the judgment of the Court of Appeals, and remand the case with instructions that it consider the Confrontation Clause issue on the merits as *Chapman* v. *California, supra,* requires. Cf. *Concerned Citizens* v. *Pine Creek Conservancy Dist., ante,* p. 651; *Moore* v. *United States, ante,* p. 20.

I respectfully dissent.

No. 76–383. EHRLICHMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 178 U. S. App. D. C. 144, 546 F. 2d 910.

No. 76–408. ROBLES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner Robert Dale Hart for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 546 F. 2d 798.

No. 76–445. LONDON PRESS, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted of offenses relating to the mailing of allegedly obscene materials in violation of 18 U. S. C. § 1461. I adhere to the view that this statute is " 'clearly overbroad and unconstitutional on its face.' " See, *e. g.,* *Millican* v. *United States,* 418 U. S. 947, 948 (1974) (BRENNAN, J., dissenting), quoting *United States* v. *Orito,* 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would grant certiorari and reverse.

No. 76-554. TULARE LAKE CANAL CO. ET AL. *v.* UNITED STATES; and

No. 76-555. SALYER LAND CO. *v.* UNITED STATES. C. A. 9th Cir. Motion of Ben Yellen et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 535 F. 2d 1093.

No. 76-629. MATTHEWS *v.* UNITED STATES. C. A. 5th Cir. Motion to strike brief of the United States and certiorari denied. Reported below: 533 F. 2d 900.

No. 76-636. BUCKLEY TOWERS CONDOMINIUM, INC., ET AL. *v.* BUCHWALD ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE POWELL would grant certiorari. Reported below: 533 F. 2d 934.

No. 76-648. CITY OF ADAIR, IOWA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 539 F. 2d 1185.

No. 76-786. MOGLE *v.* BOARD OF EDUCATION OF SEVIER COUNTY SCHOOL DISTRICT ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 540 F. 2d 478.

No. 76-650. NEW MEXICO ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Motion of Flathead Irrigation District et al. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 537 F. 2d 1102.

No. 76-676. DRESSER INDUSTRIES, INC. *v.* WEBB. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 536 F. 2d 603.

Mr. Justice Powell, with whom The Chief Justice joins, dissenting.

Respondent, captain of a vessel anchored in Seward, Alaska, left the ship and—with two crew members—went into town to pick up ship's provisions at the local bus station. Not surprisingly for Seward in January, walking conditions were hazardous due to accumulations of snow and ice. While standing at the bus station, checking off the supplies being loaded into a truck, respondent slipped and fell, sustaining injuries.

Respondent sued in the District Court, claiming that the failure of petitioner to provide special safety boots or shoes denied respondent a safe place to work, and rendered his vessel "unseaworthy." He recovered $40,000, and the Court of Appeals affirmed, remanding only for a determination whether the award should be reduced for contributory negligence on the part of respondent.

The doctrine of "seaworthiness," on which this recovery was predicated, has been extended beyond all reason. I can think of no case that goes quite this far. I would reverse summarily.

No. 76-726. United States *v.* Empire Gas Corp. C. A. 8th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice White would grant certiorari. Reported below: 537 F. 2d 296.

No. 76-739. Olson Farms, Inc. *v.* Cackling Acres, Inc., et al. C. A. 10th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 541 F. 2d 242.

No. 76-800. Allen et al. *v.* Eastman Kodak Co. et al. Sup. Ct. Ohio. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition.

No. 76-5720. Gonzales *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 544 F. 2d 520.

No. 76-794. Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Ind. *v.* Marshall, Secretary of Labor, et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice White would grant certiorari. Reported below: 177 U. S. App. D. C. 222, 543 F. 2d 369.

No. 76-874. Overmyer *v.* Lawyers Title Insurance Corp. Ct. Sp. App. Md. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 32 Md. App. 177, 359 A. 2d 260.

No. 76-854. Carpenters Pension Trust for Southern California *v.* Superior Court of California, County of Orange (Cougler, Real Party in Interest). Ct. App. Cal., 4th App. Dist. Motion of respondent Ann S. Cougler for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 76-5717. Phifer et al. *v.* North Carolina. Sup. Ct. N. C. Death penalties having been vacated by the Supreme Court of North Carolina, certiorari denied. Reported below: 290 N. C. 203, 225 S. E. 2d 786.

No. 76-5645. Brecht *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Stewart and Mr. Justice Powell would grant certiorari. Reported below: 540 F. 2d 45.

No. 76-926. Laredo Newspapers, Inc. *v.* Foster. Sup. Ct. Tex. It appearing that there is no final judgment within the meaning of 28 U. S. C. § 1257, certiorari denied.

*Rehearing Denied*

No. 75-628. **Craig et al.** *v.* **Boren, Governor of Oklahoma, et al.**, *ante*, p. 190;

No. 75-1354. **Trans World Airlines, Inc.** *v.* **Day et al.**, *ante*, p. 890;

No. 75-1631. **Kirkland et al.** *v.* **New York State Department of Correctional Services et al.**, *ante*, p. 823;

No. 75-6901. **Swigert et al.** *v.* **Miller et al.**, *ante*, p. 805;

No. 75-7003. **Scherer** *v.* **Pogue, Warden**, *ante*, p. 1038;

No. 76-365. **Sloan et al.** *v.* **Securities and Exchange Commission et al.**, *ante*, p. 1023;

No. 76-405. **Gabriel** *v.* **United States et al.**, *ante*, p. 1011;

No. 76-443. **Wesson et al.** *v.* **United States et al.**, *ante*, p. 1011;

No. 76-497. **Taxe** *v.* **United States**, *ante*, p. 1040;

No. 76-547. **Simmons** *v.* **Council Bluffs Savings Bank, Executor**, *ante*, p. 1001;

No. 76-579. **Spencer et al., dba Ted Spencer & Sons Auto Service** *v.* **Redevelopment Authority of the City of Nanticoke**, *ante*, p. 1011;

No. 76-834. **Peroff** *v.* **Hylton, U. S. Marshal, et al.**, *ante*, p. 1062;

No. 76-5231. **Gibson** *v.* **Georgia**, *ante*, p. 986;

No. 76-5304. **Sellars** *v.* **California et al.**, *ante*, p. 1025;

No. 76-5358. **Henry** *v.* **Florida**, *ante*, p. 951;

No. 76-5368. **Alvarez** *v.* **Estelle, Corrections Director**, *ante*, p. 1044;

No. 76-5480. **Miller** *v.* **Hampton, Chairman, U. S. Civil Service Commission, et al.**, *ante*, p. 1046;

No. 76-5598. **Sayles** *v.* **McGuire, U. S. District Judge**, *ante*, p. 1036; and

No. 76-5634. **Hinton** *v.* **Michigan et al.**, *ante*, p. 1048. Petitions for rehearing denied.

No. 76-5653. Zenglein *v.* Lewis et al., *ante,* p. 1049;
No. 76-5712. Smith *v.* United States, *ante,* p. 1027;
No. 76-5724. Powell *v.* Alabama, *ante,* p. 1065; and
No. 76-5735. Santana *v.* Ross, Industrial Commissioner of New York, *ante,* p. 1056. Petitions for rehearing denied.

No. 75-1466. Boston Home & School Assn. *v.* Morgan et al., 426 U. S. 935 and *ante,* p. 873. Motion for leave to file second petition for rehearing denied.

No. 76-282. Smart *v.* Jones, Sheriff, et al., *ante,* p. 887; and
No. 76-5144. Zilka *v.* Estelle, Corrections Director, *ante,* p. 981. Motions for leave to file petitions for rehearing denied.

## REPORTER'S NOTE

**The next page is purposely numbered 1301. The numbers between 1125 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations immediately available upon publication of the preliminary prints of the United States Reports.**

# OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

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## GREGG *v.* GEORGIA

### ON APPLICATION FOR STAY OF MANDATE

No. A-31 (74-6257). Decided July 22, 1976*

**Application for stay of mandate is granted pending disposition of a petition for rehearing, since, if executions were carried out before that petition could be acted on, petitioners would be irreparably harmed and cases would be moot, and since granting of stay will not prejudice respondent States' interests.**

MR. JUSTICE POWELL, Circuit Justice.

The petitioners in these cases have filed with the Court a consolidated petition for rehearing, and also have presented to me as Circuit Justice for the Fifth Circuit an application for a stay of the mandate heretofore scheduled to issue on July 27, the stay to be effective pending the disposition of the consolidated petition for rehearing. Under controlling statutes, such petition cannot be acted upon except by the full Court in regular or special session. If the executions in these cases were carried out before the petition for rehearing could be acted on by the Court, the harm to petitioners obviously would be irreparable. In addition, the cases would then be moot. Nor is there reason to believe that the granting of a stay until the petition for rehearing can be duly considered will prejudice the interests of the respondent States. In these circumstances, I conclude that the issuance of the mandate in each of these cases should be, and hereby is, stayed until further order of this Court.

The decision to grant this stay is not suggestive of my position on the merits of the petition.

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*Together with Nos. A-31 (75-5706), *Proffitt* v. *Florida*, and A-31 (75-5394), *Jurek* v. *Texas*.

# BATEMAN *v.* ARIZONA

ON APPLICATION FOR BAIL OR STAY

No. A-110 (76-5033). Decided August 16, 1976

Application for bail pending certiorari or for stay of Arizona Supreme Court's mandate is denied absent any showing of compelling necessity for a stay, and where it is doubtful if applicant's petition for certiorari will be granted and there is a question as to the finality of the Arizona Supreme Court's judgment sought to be reviewed.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant has filed a motion denominated an "Application for Bail Pending Certiorari or in the Alternative Application for Stay of Mandate of the Supreme Court of the State of Arizona." Such an applicant—who, in effect, seeks to have a single Justice of this Court stay what the state-court system has concluded should not be stayed—bears a heavy burden of demonstrating that he meets the traditional tests which a Circuit Justice must consider in passing on an application of this sort. Because of the serious questions going to applicant's standing to have this Court hear the question he tenders in his petition for a writ of certiorari, the application will, therefore, be denied.

Applicant was convicted by a jury of one count of sodomy with his wife, in violation of Ariz. Rev. Stat. § 13-651 (Supp. 1973), and of one count of lewd and lascivious acts, to wit, forcing his wife to commit fellatio on him, in violation of Ariz. Rev. Stat. § 13-652 (Supp. 1973). The jury was instructed:

> "Consent is a defense in the infamous crime against nature [the sodomy count], and to the crime of the committing lewd and lascivious acts [the fellatio count]. Any evidence which reasonably tends to show consent is relevant and material."

As applicant notes, the jury verdict of guilty "necessarily impl[ied]" that the jurors found that applicant's wife did not consent. After the trial, upon a renewed motion of applicant, the trial court dismissed the information, holding:

> "It appear[s] to the court that the Arizona statutes on sodomy and lewdness violate the Arizona and U. S. Constitutions because they could violate the right to privacy, and further that this court's interpretation of the statutes to permit the defense of consent without the benefit of legislative or appellate court guidance was improper . . . ."

The Arizona Court of Appeals affirmed, *State* v. *Bateman,* 25 Ariz. App. 1, 540 P. 2d 732 (1975). Thereafter, the Supreme Court of Arizona, after consolidating this case with *State* v. *Callaway,* vacated the Court of Appeals' decision, and remanded the case to the trial court to enter a judgment of conviction and to sentence applicant, 113 Ariz. 107, 547 P. 2d 6 (1976). The Arizona Supreme Court first concluded:

> "The Arizona statutes may . . . be properly construed to prohibit nonconsensual sexual conduct and remain constitutional." *Id.,* at 110, 547 P. 2d, at 9.[1]

The court then noted that "[t]he State may also regulate other sexual misconduct in its rightful concern for the moral welfare of its people," and therefore held:

> "[S]exual activity between two consenting adults in private is not a matter of concern for the State except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivious acts." *Id.,* at 111, 547 P. 2d, at 10.

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[1] The court noted that while the distinction between consenting and nonconsenting adults "does not appear facially from the statutes," nonetheless, "statutes do not stand alone. Judicial interpretation adds meaning to a statute as certainly as if the words were placed there by the legislature."

Applicant, in his petition for a writ of certiorari seeking review of this judgment, raises the question of whether the Arizona statutes, as construed, are unconstitutional as prohibiting "some sexual acts between consenting married persons . . . ."

After the Arizona Supreme Court handed down its decision on March 10, 1976,[2] applicant was sentenced to a term of two to four years in the Arizona State Prison on April 15, 1976. On May 11, 1976, the trial judge denied bail pending review in this Court, and, on July 13, 1976, the Arizona Supreme Court likewise denied bail.

Applicant thus presents this application for bail, or, alternatively, for a stay of mandate, to me after similar applications have been denied by two courts, including the highest tribunal of the State of Arizona. In all cases, the fact weighs heavily "that the lower court refused to stay its order pending appeal." *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers). This normal presumption deserves even greater respect in cases where the applicant is asking a Circuit Justice to interfere with the state judicial process. Cf. *Rizzo* v. *Goode,* 423 U. S. 362, 378–380 (1976); *Mitchum* v. *Foster,* 407 U. S. 225, 230–231 (1972); *Younger* v. *Harris,* 401 U. S. 37, 46 (1971). Due respect for the principles of comity necessitates a demonstration of compelling necessity before a single Justice of this Court will stay the considered mandate of the highest state tribunal.[3]

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[2] A motion for rehearing and an application to stay the judgment pending an application for a writ of certiorari in this Court were denied on April 13, 1976.

[3] Applicant does not claim that there is a constitutional right to bail, after conviction, pending appeal. I am unable to conclude that the standards enunciated in 18 U. S. C. § 3148 apply, to the exclusion of a state court's determination, in the case of a petition for a writ of certiorari to review a state conviction.

No such showing has been made. The threshold—although by no means the only—question is whether there is a reasonable probability that four Justices will vote to grant certiorari, *Graves, supra.* Considered abstractly, and without intimating any view on the merits, the question applicant tenders to this Court might be considered to meet this threshold hurdle. But serious doubts exist as to the ability of this applicant to raise a question concerning consensual sexual activity between married adults. These doubts are not lessened by the fact that the Supreme Court of Arizona chose to decide the issue which applicant now tenders to this Court. The courts of a State are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of case and controversy and standing associated with Art. III of the United States Constitution. See, *e. g., Doremus* v. *Board of Education,* 342 U. S. 429, 434 (1952).

First of all, applicant was convicted by a jury that had been charged that consent was a defense. Even assuming, *arguendo,* that this Court would conclude that the Arizona Supreme Court was incorrect in holding that a State may prohibit consensual sexual acts between married adults, it is difficult to see how applicant would be benefited, as his conviction was based on nonconsensual sexual acts, as to which applicant does not press constitutional objections.[4] See *United States* v. *Raines,* 362 U. S. 17 (1960). Doubts such as these make it difficult for me to conclude that applicant's petition for a writ of certiorari has a substantial chance of being granted.[5]

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[4] There is little indication that Arizona would vitiate applicant's conviction should this Court hold the statutes unconstitutional as applied to consensual behavior; certainly it is not "clear" that they would do so, see *United States* v. *Raines,* 362 U. S. 17, 23 (1960). Indeed, the language of the Arizona Supreme Court, quoted *supra,* at 1303, and n. 1, indicates that the question of nonconsensual activity, applicable here, was decided separately from the question of consensual activity, applicable in deciding *State* v. *Callaway.*

Secondly, applicant petitions from the March 10 decision of the Arizona Supreme Court which vacated and remanded for the imposition of a judgment of conviction and a sentence. This Court is precluded from taking cases unless the petition is from a "final judgment" within the meaning of 28 U. S. C. § 1257. In a criminal case, the "final judgment" is, of course, the imposition of a sentence, *Parr* v. *United States,* 351 U. S. 513, 518 (1956); *Berman* v. *United States,* 302 U. S. 211, 212 (1937). The Arizona Supreme Court did not remand simply for the performance of a ministerial duty—*e. g.,* the reinstating of a judgment of conviction and sentence—but for the initial imposition of a sentence. It seems likely, therefore, that the decision of the Arizona Supreme Court is not a "final judgment." While applicant was sentenced prior to the filing of his petition for a writ of certiorari, there nonetheless remains a question of the finality of the judgment applicant seeks to have reviewed by this Court. Such a doubt weighs against applicant here, *Hortonville Joint School Dist.* v. *Hortonville Education Assn.,* 423 U. S. 1301 (1975) (REHNQUIST, J., in chambers).

These considerations lead me to deny the application.

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[5] Applicant does not appear to meet the exception whereby the individual may assert a right that cannot otherwise be raised and protected. The question applicant tenders to this Court could be raised, for example, by a person who was convicted after a trial judge had refused to charge a jury that consent is a defense.

# NEW YORK ET AL. *v.* KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

### ON APPLICATION TO VACATE STAY

No. A-150. Decided August 19, 1976

Application to vacate the Court of Appeals' stay of the District Court's order preliminarily enjoining the Secretary of the Interior from opening sealed bids for oil and gas leases of submerged lands under the Mid-Atlantic Outer Continental Shelf on the ground that the environmental impact statement (EIS) required by the National Environmental Policy Act of 1969 (NEPA) before the leasing program could go forward was materially deficient, is denied absent "exceptional circumstances" warranting a Circuit Justice's vacating a stay. It is not clear that the question whether the EIS complied with the NEPA would warrant review by this Court, nor is it necessary for a Circuit Justice to act "to preserve the rights of the parties pending the final determination of the cause," *Meredith* v. *Fair*, 83 S. Ct. 10, 11, 9 L. Ed. 2d 43, 44.

MR. JUSTICE MARSHALL, Circuit Justice.

On Friday, August 13, 1976, the United States District Court for the Eastern District of New York preliminarily enjoined the Secretary of the Interior from proceeding with plans to open, on August 17, 1976, sealed bids due to be submitted for oil and gas leases of submerged lands under the Mid-Atlantic Outer Continental Shelf. On Monday, August 16, 1976, the United States Court of Appeals for the Second Circuit stayed the District Court's order. The State of New York, the Natural Resources Defense Council, and the counties of Suffolk and Nassau, plaintiffs in the District Court, applied to me as Circuit Justice to vacate the stay. After holding oral argument, I concluded that the extraordinary relief they requested was not warranted.

## I

The facts are exhaustively stated in the opinion of the District Court, and can be summarized briefly here. In

January 1974, President Nixon directed the Department of the Interior to rapidly lease Outer Continental Shelf lands for mining of oil and natural gas. In accordance with this directive, the Department of the Interior prepared a preliminary environmental impact statement (EIS), held hearings on the statement, and in July 1975 issued a final impact statement, as required by § 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U. S. C. § 4332 (2)(C). On September 29, 1975, the Acting Secretary announced his decision to adopt the accelerated oil- and gas-leasing programs.

One of the areas to be leased under the accelerated program is an area designated as Mid-Atlantic Sale No. 40, consisting of lands off the coasts of New York, New Jersey, Delaware, Maryland, and Virginia. In August 1975, the Secretary announced which tracts within the area would be leased. A new EIS devoted specifically to Sale No. 40 was drafted, hearings were held in January 1976, and a final, four-volume EIS was issued in May 1976. On July 16, 1976, a notice of the proposed lease sale was published in the Federal Register, 41 Fed. Reg. 29437. Pursuant to the notice, sealed bids were to be submitted for each tract on a cash bonus basis, accompanied by one-fifth of the cash bonus in cash or by cashier's check, bank draft, certified check, or money order. The bids were due by 9:30 a. m., August 17, 1976, and were to be opened beginning at 10 a. m.; the notice stated that if the bids were not opened by midnight, they would be returned unopened to the bidder. *Ibid.* After opening the bids, the Secretary has 30 days to accept the highest bid, *ibid.*, see 43 CFR § 3302.5 (1975); if no bid is accepted within 30 days, all bids are deemed rejected, *ibid.* Once a bid is accepted, the bidder must sign a lease within a specified time or forfeit his deposit. *Ibid.* The lease grants the lessee the exclusive right to drill for, remove, and dispose of oil and gas deposits in the leased lands; however, the lessee must submit all exploratory drilling plans and development plans to the supervisor of the lease for approval. 30 CFR § 250.34 (1975).

Prior to the publication of the notice of the lease sale, the plaintiffs instituted the instant action to enjoin the lease sale on the ground that the final EIS did not comply with the requirements of the NEPA. After 11 days of hearings the District Court issued a comprehensive opinion. In most respects, the Court found the EIS to be adequate, indeed "[i]f anything . . . too detailed and encyclopedic for a lay executive to fully comprehend." Nos. 76C1229 and 75C208 (EDNY Aug. 13, 1976). On one issue, however—an issue raised by the court *sua sponte* during the hearings—the court found the EIS materially deficient: it failed, in the court's view, to adequately analyze state laws governing the use of shorelines, and to evaluate "the probable extent of state cooperation [with] or opposition" to the offshore exploration program. To the contrary, the court found that the EIS assumed that the States would grant rights-of-way for pipelines on shorelands, thereby obviating the need for the lessees to use tankers to transport the oil and minimizing the risk of oil spills. The court concluded that as a result of this single omission, there was a likelihood that plaintiffs would succeed on the merits in demonstrating a violation of the NEPA, and it found that plaintiffs would be irreparably injured if the Secretary were permitted to grant the leases without prior compliance with the NEPA. Accordingly, the court issued a preliminary injunction.

The Secretary, joined by the National Ocean Industries Association which had intervened on the side of the Secretary, appealed the District Court's order and requested that the injunction be stayed. After hearing oral argument, the Court of Appeals granted the stay. In a brief *per curiam* opinion, the Court of Appeals stated:

> "We find nothing in this case which satisfies us that the August 17, 1976 sale, in and of itself, will cause

appellees any irreparable injury. On the other hand, the national interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted." No. 76-8369 (CA2 Aug. 16, 1976).

## II

The power of a Circuit Justice to dissolve a stay is well settled. See, *e. g., Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers); *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., in chambers); *Cunningham* v. *English*, 78 S. Ct. 3, 2 L. Ed. 2d 13 (1957) (Warren, C. J., in chambers). But it is equally well established that a Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). This is especially true where, as here, I had only a few hours to review the District Court's 200-page opinion, the briefs of the parties, and the four-volume EIS, and where I did not have before me—nor could I have meaningfully considered even if it were here—the voluminous record compiled in the District Court.

Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals. See R. Stern & E. Gressman, Supreme Court Practice § 17.19 (4th ed. 1969). Despite the practical importance of the Secretary of the Interior's decision to issue leases for the Mid-Atlantic Outer Continental Shelf, however, I am not persuaded that the legal question involved here—whether this EIS complied with the uncontested requirements of the NEPA—would warrant review by this Court. Just this past Term, in *Kleppe* v. *Sierra Club*, 427 U. S. 390 (1976), we had occasion to examine the purposes and requirements of the NEPA. Although we disagreed on certain issues, we were unanimous in concluding that the essential requirement of the NEPA is that before an agency takes major action, it must have taken "a 'hard look' at environmental consequences." 427 U. S., at 410 n. 21, quoting *Natural Resources Defense Council* v. *Morton,* 148 U. S. App. D. C. 5, 16, 458 F. 2d 827, 838 (1972). In evaluating the adequacy of EIS's the Courts of Appeals consistently have enforced this essential requirement, tempered by a practical "rule of reason."[1] As the Court of Appeals for the Second Circuit has explained:

> "[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." *Natural Resources Defense Council* v. *Callaway,* 524 F. 2d 79, 88 (1975).

In the instant case, respondents do not appear to challenge the requirement that the agency take a "hard look" at the environmental consequences, nor do applicants question the appropriateness of employing a rule of reason in evaluating impact statements. Thus, the sole question at issue is whether the District Court properly applied the controlling standards in concluding that the EIS lacked information concerning state regulation of shorelands which was "reasonably necessary" for evaluating the project. That question appropriately is for the Court of Appeals, and I do not believe that four Members of this Court would vote to grant a writ of certiorari to review its conclusion on such a fact-intensive issue. Accordingly, it is not appropriate for me to exercise my extraordinary powers as Circuit Justice in order to preserve a question for review by the full Court.

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[1] See, *e. g., Sierra Club* v. *Morton,* 510 F. 2d 813, 819 (CA5 1975); *Trout Unlimited* v. *Morton,* 509 F. 2d 1276, 1283 (CA9 1974); *Harlem Valley Transportation Assn.* v. *Stafford,* 500 F. 2d 328, 337 (CA2 1974); *Iowa Citizens for Environmental Quality* v. *Volpe,* 487 F. 2d 849, 852 (CA8 1973); *Natural Resources Defense Council* v. *Morton,* 148 U. S. App. D. C. 5, 12, 458 F. 2d 827, 834 (1972).

Nor is it necessary for me to act in this case "to preserve the rights of the parties pending final determination of the cause." *Meredith* v. *Fair*, 83 S. Ct., at 11, 9 L. Ed. 2d, at 44. The Court of Appeals concluded that plaintiffs would not be irreparably injured if the Secretary were permitted to open the bids. I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an "irreversible commitment of resources," *Natural Resources Defense Council* v. *NRC*, 539 F. 2d 824, 844 (CA2 1976), a citizen's right to have environmental factors taken into account by the decision-maker would be irreparably impaired. For this reason, the lower courts repeatedly have enjoined the Government from making such resource commitments without first preparing adequate impact statements.[2] Indeed this past Term, in *Kleppe* v. *Sierra Club*, *supra*, we indicated that it would have been appropriate for the Court of Appeals to have enjoined the approval of mining plans had that court concluded that "the impact statement covering [the mining plans] inadequately analyzed the environmental impacts of, and the alternatives to, their approval." 427 U. S., at 407–408, n. 16.

In the instant case, however, the Court of Appeals apparently decided that the opening of bids does not constitute an "irreversible commitment of resources." I am unprepared to say that the court was wrong in so holding. In the first instance, it is quite clear that the actual opening of the bids does not involve a commitment of any kind, since the Secretary reserves the right to reject all bids. Thus it is not until a bid is accepted—which may not happen for 30 days—that an irreversible commitment is even arguably made.[3] Moreover, even after the bids are accepted, I cannot say that the Court of Appeals would be without power to declare the leases invalid if the court determined that the Government entered into leases without compliance with the requirements of the NEPA.

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[2] See, *e. g.*, *Natural Resources Defense Council* v. *NRC*; *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164, 1183–1184 (CA6 1972); *Scherr* v. *Volpe*, 466 F. 2d 1027, 1034 (CA7 1972); *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 146 U. S. App. D. C. 33, 52, 449 F. 2d 1109, 1128 (1971). See generally F. Anderson, NEPA in the Courts 239–246 (1973).

For the foregoing reasons, I have concluded that this case does not present the "exceptional circumstances," *Holtzman* v. *Schlesinger,* 414 U. S., at 1308, that warrant a Circuit Justice to vacate a stay.

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[3] In the instant case, it is possible that before the bids are accepted the District Court will decide that the defect in the EIS has been remedied by a supplemental affidavit prepared by the Secretary in response to the court's opinion. That affidavit was presented to the Court of Appeals as an appendix to the Government's brief; it was also presented to me, but because it had not yet been given to the District Court, I declined to consider it. I was informed at argument, however, that the affidavit discusses the extent to which the Secretary considered the possibility of lack of state cooperation in making his decision to approve Sale No. 40.

# GRUNER *et al.* *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

ON APPLICATION FOR STAY

No. A-190. Decided September 3, 1976

Application for stay, pending disposition of petition for certiorari, of California court orders of commitment against applicant newspaper editors and reporters entered pursuant to contempt judgments for refusing to disclose sources for certain news articles, and for a temporary stay until this Court acts on such request for a stay, is denied where applicants have twice unsuccessfully sought review in this Court on similar grounds.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants seek a stay of orders of commitment, pursuant to state contempt judgments, pending this Court's disposition of a petition for a writ of certiorari, No. 76-328, on the underlying issue. Applicants also seek a temporary stay until this Court acts upon their request for a stay pending disposition of the petition.

Applicants are editors and reporters employed by the Fresno Bee, a California daily newspaper. Applicants have refused to answer in open court certain questions propounded regarding the identity of sources used by applicants for certain news articles. The articles contained information based upon sealed grand jury testimony. The Superior Court entered judgments of contempt against each of the applicants and ordered that the applicants be jailed until they answer the questions propounded. Applications for stays were denied by the Superior Court in Fresno on August 25, 1976, and by the California Supreme Court on September 2, 1976.

On two prior occasions the applicants have unsuccessfully sought review by this Court. On March 20, 1975, an application for stay pending disposition of a petition for writ of certiorari was filed with this Court and denied shortly thereafter. *Patterson* v. *Superior Court of California,* 420 U. S. 1301. No petition for certiorari was filed in that matter. In December 1975, a petition for writ of certiorari seeking review of the California courts' affirmation of the contempt judgments was filed with this Court. The petition for the writ of certiorari was denied. *Rosato* v. *Superior Court of California,* 427 U. S. 912 (1976).

On those occasions applicants raised the sort of First and Fourteenth Amendment issues that were dealt with in this Court's opinion in *Branzburg* v. *Hayes,* 408 U. S. 665 (1972). Their present stay application relies largely on the same grounds; since there were not four Justices of the Court disposed to grant certiorari on this very issue in this very case less than three months ago, there is no reason to think that there are four so disposed now. Applicants in their petition for certiorari raise a somewhat different claim, asserting that, before they may be committed for their refusal to testify, they are entitled to a "due process hearing" to determine whether or not the commitment for contempt has a reasonable prospect of accomplishing its purpose. None of our cases support the existence of any such requirement, and applicants' position seems to boil down to a contention that if they but assure the court of their complete recalcitrance, the court is powerless to commit them for contempt.

The application for a stay pending the disposition of the petition for a writ of certiorari in No. 76-328, *Gruner* v. *Superior Court,* and the application for a temporary stay are therefore denied.

# McCARTHY ET AL. *v.* BRISCOE, GOVERNOR OF TEXAS, ET AL.

ON APPLICATION FOR STAY

No. A-201. Decided September 14, 1976

Application for a partial stay of a three-judge District Court's order and judgment denying injunctive relief to applicants on the ground of laches, is denied, since a direct appeal to this Court does not lie under 28 U. S. C. § 1253 and hence the Court is without jurisdiction to grant the requested relief.

MR. JUSTICE POWELL, Circuit Justice.

This application, for a partial stay of an order and judgment of a three-judge District Court for the Western District of Texas, reaches me during the summer recess of the Court. Following a practice utilized by other Justices and by myself on previous occasions, see, *e. g., Graves* v. *Barnes,* 405 U. S. 1201 (1972) (POWELL, J., in chambers), I have consulted informally with each of my Brethren who was available.* Although no other Justice has participated in the drafting of this order, I am authorized to say that each of those consulted would vote to deny the application for the reason stated below.

In denying injunctive relief to applicants, the three-judge District Court based its action not upon resolution of the merits of the constitutional claim presented (which it resolved in favor of applicants), but upon the equitable doctrine of laches. I conclude, therefore, that direct appeal to this Court does not lie under 28 U. S. C. § 1253, *MTM, Inc.* v. *Baxley,* 420 U. S. 799, 804 (1975), and that the Court is without jurisdiction to grant the relief now requested. Accordingly, the application for a stay is denied, but without prejudice to the right of applicants to seek relief in the Court of Appeals.

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*All Members of the Court, save two who were not available, have been consulted.

# McCARTHY ET AL. *v.* BRISCOE, GOVERNOR OF TEXAS, ET AL.

## ON APPLICATION FOR INJUNCTION

No. A-247. Decided September 30, 1976

Application for an injunction ordering that applicant McCarthy's name be placed on the 1976 general election ballot in Texas as an independent candidate for President, is granted, where the District Court properly determined that the Texas Election Code provision precluding candidates from gaining access to the ballot as independents was unconstitutional, but denied the requested relief on the mistaken assumption that a lengthy signature-gathering process was the only means of demonstrating requisite community support.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for injunctive relief,[1] presented to me as Circuit Justice. The applicants, former Senator Eugene J. McCarthy and four Texas voters who support Senator McCarthy's independent candidacy for President, have asked that I order Senator McCarthy's name placed on the 1976 general election ballot in Texas. They sought relief without success from a three-judge District Court for the Western District of Texas and, on appeal, from the Court of Appeals for the Fifth Circuit.[2] Upon consideration of the record before me, I have concluded that the courts below erred in failing to remedy a clear violation of the applicants' constitutional rights. I have therefore granted the requested relief.

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[1] Although the application is styled "Application for a partial stay of an order and judgment of the United States Court of Appeals, Fifth Circuit," the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U. S. C. § 1651 and Rules 50 and 51 of this Court.

[2] The applicants filed an initial application in this Court for a stay of the District Court order on September 8, 1976, before they had filed an appeal to the Court of Appeals. In my capacity as Circuit Justice, I denied that request on September 14 on the ground that this Court was without jurisdiction to entertain a direct appeal from the District Court under 28 U. S. C. § 1253. *Ante*, p. 1316. See *MTM, Inc.* v. *Baxley*, 420 U. S. 799, 804 (1975). I specified that the denial was without prejudice to the applicants' right to seek relief in the Court of Appeals. The applicants

Effective September 1, 1975, Texas amended its Election Code so as to preclude candidates for the office of President from qualifying for position on the general election ballot as independents. Acts of 1975, c. 682, § 23, codified in Tex. Elec. Code, Art. 13.50, subd. 1 (Supp. 1976). Before that date independent candidates for all offices had been able to gain access to the ballot by submitting a prescribed number of voters' signatures by a deadline several months in advance of the general election. Tex. Elec. Code, Arts. 13.50, 13.51 (1967); see *American Party of Texas* v. *White,* 415 U. S. 767, 788–791 (1974). Under the new law that method of qualifying for the ballot was carried forward for most offices, but not for the office of President.[3] A Presidential candidate must now be a member of a political party as a precondition to securing a place on the ballot An independent candidate can seek election as President only by joining or organizing a political party, Tex. Elec. Code, Arts. 13.02, 13.45 (Supp. 1976), or by mounting a campaign to have his supporters "write in" his name on election day, Arts. 6.05, 6.06 (Supp. 1976).

On July 30, 1976, the applicants filed this suit in the District Court, claiming that Art. 13.50 of the Texas Election

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filed a notice of appeal in the Court of Appeals on September 16; the Court of Appeals denied their request for interlocutory relief on September 23; and the applicants renewed their application here the following day.

[3] Candidates for the offices of Vice Presidential and Presidential elector are similarly excluded from qualifying as independents. Art. 13.50, subd. 1 (Supp. 1976). Although two of the applicants are candidates for the office of Presidential elector, they have not specifically sought relief with respect to their own candidacies. My order of September 27 (see n. 4, *infra*) is sufficiently broad to encompass such relief, to the extent necessary to perfect Senator McCarthy's qualification for general election.

Code, as amended, violated the rights "secured to them under Article II, Section 1, Clauses 2 and 4, and Article VI, Clause 2 of the United States Constitution and the First, Twelfth and Fourteenth Amendments thereto." The applicants asked the court to order Senator McCarthy's name placed on the ballot or, alternatively, to devise reasonable criteria by which Senator McCarthy might demonstrate support for his candidacy as a means of qualifying for ballot position. The applicants submitted affidavits that tended to show that Senator McCarthy was a serious Presidential aspirant with substantial support in many States.

The defendants, the Governor and Secretary of State of the State of Texas, denied that the new law was unconstitutional and claimed that Senator McCarthy was barred by laches from obtaining the injunctive relief he requested. In support of the laches claim, the defendants presented the affidavit and later the live testimony of Mark W. White, Jr., the Secretary of State, to the effect that it would be impossible in the time remaining before the November election for the State to verify that Senator McCarthy had substantial support among Texas voters.

On September 3, 1976, the District Court held that the Texas law, as amended, was constitutionally invalid for failure to provide independents a reasonable procedure for gaining ballot access, but declined to enter injunctive relief. The court perceived its only choice to be one

> "between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights . . . ." Memorandum Opinion 2.

Believing it to be "too late for us to fashion meaningful relief without substantially disrupting the entire Texas election scheme," the court concluded that injunctive relief was not warranted. *Ibid.*

On September 23, 1976, the Court of Appeals denied the applicants' request for emergency injunctive relief on the same basis:

> "We are . . . regretfully constrained to agree with the District Court that because the complaint was so lately filed there is insufficient time for the Court to devise a petition requirement for ascertaining whether McCarthy has substantial community support in Texas without disrupting the entire election process in that state. . . ."

The following day, September 24, 1976, the applicants presented this application to me as Circuit Justice.

The new Texas law precluding independent candidates for President from gaining access to the general election ballot as independents raises no novel issue of constitutional law. In *Storer* v. *Brown,* 415 U. S. 724 (1974), the Court flatly rejected the notion that an independent could be forced to seek ballot position by joining or organizing a political party:

> "It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. *American Party of Texas* v. *White,* [415 U. S. 767 (1974)]. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it

> would mean undertaking the serious responsibilities of qualified party status . . . such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not." *Id.,* at 745–746.

And in *Lubin* v. *Panish,* 415 U. S. 709 (1974), the Court characterized as "dubious at best" the intimation that a write-in provision was an acceptable means of ballot access:

> "The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. . . . That disparity would, itself, give rise to constitutional questions . . . ." *Id.,* at 719 n. 5.

In view of these pronouncements, the District Court was fully justified in characterizing the new Texas law—enacted little more than a year after *Storer* and *Lubin* were decided—as demonstrating an "intransigent and discriminatory position" and an "incomprehensible policy."

Despite this recognition of the clear constitutional infirmity of the Texas statute, the District Court refused to grant the requested relief. The District Court, and the Court of Appeals, apparently assumed that the only appropriate remedy was to order implementation of the former statutory procedure permitting independent Presidential candidates to demonstrate substantial support by gathering a prescribed number of voters' signatures—a procedure still available to independent candidates for most other elective offices. Since the signature-gathering procedure involved not only a filing deadline which had long since expired but also a lengthy process of signature verification, both lower courts concluded that there was too little time to impose a signature-gathering requirement without undue disruption of the State's electoral process.

This Court will normally accept findings of a district court, affirmed by a court of appeals, on factual considerations such as those underlying a determination of laches. But acceptance of findings of fact does not in this case require acceptance of the conclusion that violation of the applicants' constitutional rights must go unremedied. In assuming that a signature-gathering process was the *only* available remedy, the courts below gave too little recognition to the amendment passed by the Texas Legislature making that very process unavailable to independent candidates for the office of President. In taking that action, the Texas Legislature provided no means by which an independent Presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as a remedy for what the District Court properly characterized as an "incomprehensible policy" violative of constitutional rights. This is a course that has been followed before both in this Court, see *Williams* v. *Rhodes,* 89 S. Ct. 1, 21 L. Ed. 2d 69 (1968) (STEWART, J., in chambers), and, more recently, in three District Court decisions involving Senator McCarthy, *McCarthy* v. *Noel,* No. 76-0402 (RI Sept. 24, 1976); *McCarthy* v. *Tribbitt,* No. 76-300 (Del. Sept. 16, 1976); *McCarthy* v. *Askew,* No. 76-1460-Civ-NCR (Fla. Sept. 15, 1976).

In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter participation and confuse and frustrate those who do participate." *Lubin* v. *Panish, supra,* at 715. But where a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support. See *McCarthy* v. *Askew, supra.*

It is not seriously contested that Senator McCarthy is a nationally known figure; that he served two terms in the United States Senate and five in the United States House of Representatives; that he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he has succeeded this year in qualifying for position on the general election ballot in many States. The defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere.

For the reasons stated, I have ordered that the application be granted and that the Secretary of State place the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of President of the United States.[4] I have consulted informally with each of my Brethren and, although no other Justice has participated in the drafting of this opinion, I am authorized to say that a majority of the Court would grant the application.[5]

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[4] The order granting the application was issued on September 27, 1976. The Texas Election Code does not appear to prescribe a deadline for the printing of ballots for the general election. The earliest date when printed ballots are required for any purpose is October 13, 20 days before the election, when the statutory period for absentee voting by mail begins. Art. 5.05, subd. 4 (a) (Supp. 1976). Ballots are to be mailed to persons outside the United States "as soon as possible after the ballots become available, but not earlier than [October 3]," Art. 5.05, subd. 4e, and to others intending to vote by mail on October 13 "or as soon thereafter as possible," Art. 5.05, subd. 4 (b). Political parties are not required to certify their nominees to the Secretary of State until September 28, Art. 11.04 (1967), and the Secretary of State is not required to certify the names of those who have qualified for ballot

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position to local election officials until October 3, Art. 1.03, subd. 2 (Supp. 1976). Thus there appears to be ample time to add Senator McCarthy's name.

[5] MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST have asked to be recorded as holding a different view.

# FISHMAN ET AL. v. SCHAFFER, SECRETARY OF STATE OF CONNECTICUT, ET AL.

ON APPLICATION FOR INJUNCTION

No. A-257. Decided October 1, 1976

Application for an injunction ordering that the names of the Communist Party candidates for President and Vice President be placed on the ballot in Connecticut for the November 2, 1976, election is denied. The question of the constitutionality of the allegedly unduly burdensome filing procedures prescribed by the Connecticut statute for access to the ballot is too novel and uncertain to warrant a single Justice's acting unilaterally. Moreover, applicants delayed unnecessarily in commencing suit attacking the statute, and respondent state officials claim that an injunction at this time would have a chaotic and disruptive effect upon the electoral process. *McCarthy* v. *Briscoe, ante,* p. 1317; *Williams* v. *Rhodes,* 89 S. Ct. 1, 21 L. Ed. 2d 69; *Williams* v. *Rhodes,* 393 U. S. 23, distinguished.

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application to me as Circuit Justice for an injunction ordering officials of the State of Connecticut to place on the ballot for the November 2 election the names of the Communist Party candidates for President and Vice President of the United States, Gus Hall and Jarvis Tyner, respectively. Applicants[1] sought relief without success from a three-judge District Court for the District of Connecticut and, on appeal, from the Court of Appeals for the Second Circuit.[2] While there is no question of my power to grant such relief, this Court's Rule 51; *McCarthy* v. *Briscoe, ante,* p. 1317 (POWELL, J., in chambers); *Williams* v. *Rhodes,* 89 S. Ct. 1, 21 L. Ed. 2d 69 (1968) (STEWART, J., in chambers), it is equally clear that "such power should be used sparingly and only in the most critical and exigent circumstances." *Williams* v. *Rhodes,* 89 S. Ct., at 2, 21 L. Ed. 2d, at 70. Since this case does not meet that standard, I must deny the requested relief.

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[1] Applicants are two petition circulators (Fishman and Gagyi) and the Presidential and Vice Presidential candidates of the Communist Party (Hall and Tyner), for whose candidacy Fishman and Gagyi circulated petitions.

[2] In view of the District Court's denial of relief on equitable grounds without deciding the merits of the constitutional attack, applicants properly sought review initially in the Court of Appeals. See *McCarthy* v. *Briscoe, ante,* at 1317–1318, n. 2; *MTM, Inc.* v. *Baxley,* 420 U. S. 799, 804 (1975).

Applicants filed their complaint on July 2, 1976, attacking as unconstitutionally burdensome certain provisions of the Connecticut election law which apply to candidates seeking to get on the ballot by means of nominating petitions. They sought declaratory and injunctive relief against enforcement of only a small segment of this procedure—the prescribed method for filing the completed petitions. Conn. Gen. Stat. § 9–453a *et seq.* (1975).

In order to demonstrate a "significant modicum of support," *Jenness* v. *Fortson,* 403 U. S. 431, 442 (1971), Connecticut requires potential candidates to submit petitions signed by electors equal to one percent of the number who voted for the same office in the previous election. Conn. Gen. Stat. § 9–453d (1975). The petitions are available immediately after the last statewide election and do not have to be filed until nine weeks before the relevant election. § 9–453i. Thus, the numerical and time requirements of the statute are, as the District Court observed, "markedly more favorable" to the potential candidate than are constitutionally required. Civ. No. H–76–263 (Conn., July 2, 1976); see *Storer* v. *Brown,* 415 U. S. 724 (1974); *American Party of Texas* v. *White,* 415 U. S. 767 (1974); *Jenness* v. *Fortson, supra;* Note, Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1123–1130 (1975).

As a means of assuring the authenticity of the signatures collected, the law requires that the circulator sign a statement under penalty of perjury that (1) each signer of a petition signed the petition in his or her presence, and (2) he or she either knew the signer, or the signer satisfactorily identified himself or herself to the circulator. This procedure must be performed personally before the town clerk in each town where any petition signer resides. Applicants do not object to the need for the circulator to make the required statement. They claim, however, that the requirement that it be done personally in front of numerous town clerks necessitates so much travel that it is unconstitutionally burdensome.[3] While acknowledging that the State has a valid and important interest in assuring the authenticity of the signatures and the eligibility of the signers, applicants argue that this interest can be served in ways less burdensome to the circulators.

The District Court, while sympathetic to this claim, did not rule on the merits, since it found applicants' suit barred by laches. It noted that applicants had tried and failed to qualify for a position on the ballot in a previous election. They were familiar with the statute and could have brought suit earlier. The delay meant that the legislature could not consider alternative filing requirements; instead, relief, if warranted, would have to be the drastic remedy of putting the candidates on the ballot, leaving the State with no protection of its interest in authenticity. Accordingly, the District

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[3] Specifically, they object to those portions of Conn. Gen. Stat. §§ 9–453i and 453k (1975) which require:

1. "Each page of a nominating petition shall be submitted *by the person who circulated the same to the town clerk of the town in which the signers reside* . . . ." § 9–453i (emphasis supplied).

2. "The town clerk shall not accept any page of a nominating petition *unless the circulator thereof signs in his presence the statement* as to the *authenticity* of the signatures thereon required by section 9–453j." § 9–453k (a) (emphasis supplied).

3. "The town clerk shall *certify* on each such page that the circulator thereof signed such statement in his presence and that either he knows the circulator or that the circulator satisfactorily identified himself to the town clerk." § 9–453k (b) (emphasis supplied).

Court dismissed the action. The Court of Appeals, in an expedited appeal, affirmed without opinion.

Turning to the merits of the application, as I noted previously, the relief sought is extraordinary. So far as I am aware, a single Justice of this Court has ordered a State to put a candidate's name on the ballot only twice. *McCarthy* v. *Briscoe, ante,* p. 1317; *Williams* v. *Rhodes, supra.* This case lacks all the significant features warranting relief in those cases.

*McCarthy* presented "no novel issue of constitutional law." *Ante,* at 1320. In MR. JUSTICE POWELL's view, the Texas Legislature had adopted an "'incomprehensible policy,'" amending its Election Code so as to preclude independent candidates for the office of President from qualifying for the general election ballot. *Ante,* at 1321. This deliberate refusal to provide access to independents was characterized by both the District Court and MR. JUSTICE POWELL as demonstrating an "'intransigent and discriminatory position.'" *Ibid.* Thus, there was no question that Texas had clearly violated the constitutional requirements for ballot access.

In contrast, the constitutionality of the Connecticut statute is at best a close question. I have no doubt about the correct standard of review:

> "[W]hether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination . . . their validity depends upon whether they are necessary to further compelling state interests. . . . [The limitations must be] reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party of Texas* v. *White, supra,* at 780–781.

Nevertheless, there is little precedent dealing specifically with filing procedures. Indeed, the one case touching on the subject, *American Party of Texas* v. *White,* suggests that a requirement more burdensome than Connecticut's—that all signatures be notarized at the time they are collected—is not unconstitutional, at least absent more proof of impracticability or unusual burdensomeness than was before the Court. 415 U. S., at 787. Moreover, unlike the Texas law in *McCarthy* which provided no means of access whatever for an independent candidate, and the Ohio law which made it "virtually impossible" for a new political party to get on the ballot, *Williams* v. *Rhodes,* 393 U. S. 23, 25 (1968), Connecticut has one of the more liberal ballot-access statutes. Far from the intransigence found in *McCarthy,* here the Connecticut Legislature apparently sought to deal rationally with abuses it had encountered in the petitioning process. See Connecticut General Assembly, 7 House Proceedings 2313–2314 (1957).

Furthermore, while there may be less burdensome ways to authenticate signatures, the fact remains that a number of groups have successfully used the Connecticut procedures. Since 1968, four petitioning parties have qualified on a statewide basis under the same procedures now attacked. Affidavit of Henry Cohn, Elections Attorney and Director of the Elections Division of the Secretary of State's Office, Aug. 2, 1976. In addition, according to Mr. Cohn's later affidavit of September 17, 1976, it appeared that the United States Labor Party would qualify Presidential candidates this year. In view of this record showing that it is feasible to comply with the requirement under attack, applicants' claims that the statute is unduly onerous become less compelling. See *American Party of Texas* v. *White, supra,* at 779, 783–784. While I do not intimate that applicants may not ultimately prevail on the merits,[4] I do conclude that unlike *McCarthy,* the question is too novel and uncertain to warrant a single Justice's acting unilaterally to strip the State of its chosen method of protecting its interests in the authenticity of petition signatures.

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[4] I imply no view on the correctness of the dismissal of the action insofar as it seeks declaratory relief. Moreover, I note that that claim will not be rendered moot by the occurrence of the election or by our refusal to grant affirmative relief now. *American Party of Texas* v. *White,* 415 U. S., at 770 n. 1; *Storer* v. *Brown,* 415 U. S. 724, 737 n. 8 (1974).

In addition to these distinctions on the merits, there are several additional factors militating against the extraordinary relief sought. First, applicants delayed unnecessarily in commencing this suit. The statute is not a new enactment and applicants have, in fact, utilized it before. In 1972, the Communist Party unsuccessfully circulated petitions for Presidential electors. And in 1974, Joelle Fishman, one of the applicant-electors in this suit, successfully qualified as a petitioning candidate for Congress. Thus applicants were sufficiently familiar with the statute's requirements and could have sued earlier. Moreover, respondents strongly oppose the relief sought, claiming that an injunction at this time would have a chaotic and disruptive effect upon the electoral process. Defendants' Response in Opposition to Application 1. The Presidential and overseas ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed. *Id.*, at 2. This stands in marked contrast to the situation in *Williams* v. *Rhodes,* where Ohio agreed that the American Independent Party could be placed on the ballot without disrupting the election. 89 S. Ct., at 2, 21 L. Ed. 2d, at 70; *Williams* v. *Rhodes,* 393 U. S., at 35. It also differs from *McCarthy,* where it appears that Texas had neither printed nor distributed any ballots when the injunction was issued. *Ante,* at 1323–1324, n. 4.

For these reasons, I conclude that the application should be denied.

*It is so ordered.*

# VOLVO OF AMERICA CORP. *v.* SCHWARZER, U. S. DISTRICT JUDGE (ROSACK ET AL., REAL PARTIES IN INTEREST)

### ON APPLICATION FOR STAY

No. A-395. Decided November 15, 1976

Application for stay of District Court's order pursuant to 28 U. S. C. § 1447 (c) remanding an alleged diversity class action to state court on the ground that the District Court had no jurisdiction of the action is denied, since appellate review of a remand order based on § 1447 (c), whether erroneous or not, is barred by § 1447 (d). *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, distinguished.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks a stay of an order of the District Court for the Northern District of California remanding this case to the California state-court system. Because I believe, for the reasons outlined below, that the order of the District Court is not subject to review, the application will be denied.

This state-law antitrust action was originally brought by Charlene Rosack in the California Superior Court for San Mateo County seeking damages individually and on behalf of a class of persons who purchased new Volvo automobiles from California Volvo dealers during the years 1967–1976. Defendants removed the action to the Federal District Court pursuant to 28 U. S. C. § 1441 (a), alleging that the action was within the original diversity jurisdiction of this court as prescribed in 28 U. S. C. § 1332. Plaintiff moved to remand the action to the state court on the ground, *inter alia,* that the amount in controversy did not exceed $10,000 as required by § 1332. The District Court granted the motion. Its action was premised on the belief that the case "must be treated as a class action for the purpose of determining jurisdictional issues," whereas here "it appears that only a few members of a class estimated to have some 50,000 members meet the jurisdictional requirement." The District Court accordingly held:

> "It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn* [v. *International Paper Co.,* 414 U. S. 291 (1973)], all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U. S. C. § 1447 (c)."[1]

Applicant attacks this conclusion, contending that since the District Court specifically found that jurisdiction existed over "a few members of" the class, the court's order remanding the entire action was not authorized by 28 U. S. C. § 1447 (c). The flaw in this argument is that, while the District Court may have been wrong in its analysis, it clearly stated, citing to § 1447 (c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with § 1447 (c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of 28 U. S. C. § 1447 (d):

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

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[1] The Ninth Circuit denied the petition for a writ of mandamus and/or prohibition on November 11, 1976.

We held last Term in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), where the District Court ordered a remand because of its crowded docket, that § 1447 (d) did not bar review of remand orders "issued on grounds not authorized by § 1447 (c)," 423 U. S., at 343.[2] But the District Court here *did* base its order on § 1447 (c). *Thermtron* is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court "does not have jurisdiction of this action," see 423 U. S., at 343–344. Applicant's position would mean that any allegedly erroneous application of § 1447 (c) would be reviewable by writ of mandamus, leaving the § 1447 (d) bar extant only in the case of allegedly proper applications of § 1447 (c), a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron.*[3]

Since I do not believe four Members of this Court would find the order of the District Court subject to review, the application for a stay is denied.

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[2] In *Thermtron,* the District Court acknowledged that the defendant had a "right" to remove the action, pursuant to 28 U. S. C. § 1441, but that this right had to be " 'balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action.' " 423 U. S., at 340. As we noted, that order "was based on grounds wholly different from those upon which § 1447 (c) permits remand." *Id.,* at 344.

[3] "It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447 (c) *whether erroneous or not* . . . . If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." 423 U. S., at 343 (emphasis added).

# EVANS, GOVERNOR OF WASHINGTON, ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL.

ON APPLICATION FOR STAY

No. A-456. Decided December 9, 1976

Application for stay of the District Court's order enjoining the enforcement of a Washington State statute regulating oil tankers on ground that it was pre-empted by federal statutes, is referred to the full Court because of sufficient complexity of the issues involved and uncertainty as to their resolution, but in the meantime the stay issued by the District Court itself and due to expire shortly is continued until further order of this Court.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, officials of the State of Washington, seek a stay of the order of the United States District Court for the Western District of Washington, entered November 12, 1976, enjoining enforcement of Chapter 125 of the Laws of the State of Washington, 1975, First Extraordinary Session, Wash. Rev. Code § 88.16.170 *et seq.* This statute, designed "to decrease the likelihood of oil spills on Puget Sound and its shorelines," imposes regulations on oil tankers over 40,000 deadweight tons (DWT)* and prohibits "supertankers" of over 125,000 DWT. On the date the statute became effective, September 8, 1975, respondents filed suit in the United States District Court for the Western District of Washington, claiming that Chapter 125 had been preempted by federal law, particularly the Ports and Waterways Safety Act of 1972 (PWSA), 86 Stat. 424, as amended, 33 U. S. C. § 1221 *et seq.* (1970 ed., Supp. V), 46 U. S. C. § 391a

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*Tankers between 40,000 and 125,000 DWT may enter Puget Sound (a) if they contain certain enumerated safety features or (b) if they are accompanied by a tug escort. Tankers over 50,000 DWT are required to have state-licensed pilots on board when navigating Puget Sound.

(1970 ed., Supp. V), and that Chapter 125 imposed an undue burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. A three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284; the case was heard pursuant to an agreed statement of facts; and an opinion was issued on September 23, 1976, holding Chapter 125 pre-empted in its entirety: the state pilotage requirement by conflict with 46 U. S. C. §§ 215 and 364, and the remainder of Chapter 125 by the PWSA. On motion by respondents a permanent injunction was issued on November 12, 1976, but that order was stayed until December 15, 1976.

On consideration of the application and response, it appears that the issues involved are of sufficient complexity, and their resolution sufficiently uncertain, to warrant consideration by the full Court. Such consideration ordinarily occurs at a regularly scheduled Conference of the Court, to which the matter is referred by the Circuit Justice. The Court has a Conference scheduled for Friday, December 10, but I have elected not to refer this application to that Conference. Consideration by the full Court presupposes adequate time for each Justice to study the application and response prior to Conference, and at this point such time simply is not available.

Since I do not believe that this case is of such extraordinary urgency as to warrant my requesting THE CHIEF JUSTICE to schedule a special Conference to consider it, I have elected to refer the application to the next regularly scheduled Conference of the Court. Because that Conference will occur after December 15, the date on which the stay issued by the District Court expires, I think it is incumbent on me to exercise my authority as Circuit Justice to determine how the matter shall remain until it can be considered by the full Court. The state officials' showing of irreparable injury in the absence of a temporary stay, while not entirely unpersuasive, is not by any means overwhelming. Respondents' estimates of financial loss if the District Court stay is continued are at least equally marginal. Respondents have operated in compliance with the state statute for more than a year, and at no time during the pendency of their suit in the District Court did they seek preliminary relief. On balance I have decided that respondents should be required to continue to operate in this manner pending consideration of the application by the Court.

It is therefore ordered that the stay of the order of permanent injunction dated November 12, 1976, which would by its terms expire December 15, 1976, be continued until further order of this Court. The application for stay will be referred to the full Court at the Conference following December 10.

Opinion in Chambers

# MEEROPOL ET AL. v. NIZER ET AL.

ON APPLICATION FOR ISSUANCE OF A CERTIFICATE OF NECESSITY

No. A-543. Decided January 18, 1977

Title 28 U. S. C. § 291 (a) authorizes THE CHIEF JUSTICE to designate temporarily any circuit judge to act in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice. Application to a Circuit Justice for a certificate of necessity under § 291 (a) requesting that THE CHIEF JUSTICE designate judges from other circuits to sit in applicants' appeal to Court of Appeals for the Second Circuit or for transfer of appeal to another court of appeals, because of alleged disqualification of all Second Circuit judges, is denied. Since § 291 (a) deals with a purely administrative matter, it would be inappropriate for a Circuit Justice to rule on an application under it that all Second Circuit judges are as a matter of law disqualified from hearing the appeal, and moreover a Circuit Justice does not have the power to unseat all the judges of a court of appeals in a particular case, absent any showing that they have recused themselves, or to transfer the appeal to another court.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicants Michael and Robert Meeropol brought this action in the District Court for the Southern District of New York against respondent Nizer, author of the book The Implosion Conspiracy, and respondents Doubleday & Co. and Fawcett Publications, its publishers, alleging copyright infringement, libel, and invasion of privacy. Summary judgment was granted for respondents on all claims, and applicants have appealed to the Court of Appeals for the Second Circuit. Applicants move before me as Circuit Justice to issue a certificate of necessity under 28 U. S. C. § 291 (a) or 28 U. S. C. § 1651, requesting THE CHIEF JUSTICE to designate judges from other circuits to sit in the appeal of this case.[1]

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[1] Applicants initially moved before the Second Circuit for en banc consideration of their request for issuance of a certificate of necessity or transfer of the appeal to another circuit. That request was denied, with

Applicants are the sons of Julius and Ethel Rosenberg, who were executed in 1953 after their convictions for conspiracy to commit espionage. See *United States* v. *Rosenberg,* 195 F. 2d 583 (CA2), cert. denied, 344 U. S. 838 (1952); *Rosenberg* v. *United States,* 346 U. S. 273 (1953). The gravamen of applicants' action is that the Nizer book infringed the copyright which applicants own in the book Deathhouse Letters of Ethel and Julius Rosenberg, and libeled and invaded the privacy of applicants in its portrayal of the Rosenbergs' relationship with their children. Applicants contend in this motion that all of the judges of the Second Circuit are disqualified from hearing their appeal, essentially because they are, in the words of Judge Mansfield's decision, "associates," "friends," and "consultants" of Chief Judge Irving R. Kaufman of the Second Circuit, who presided as a District Judge over the Rosenberg trial and imposed the death sentences.[2]

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Chief Judge Kaufman and Judge Oakes not participating. No application for a certificate of necessity was made to the Chief Judge. The motion was then set down for a hearing before a panel of the Second Circuit, and after some delay was heard by Judges Mansfield, Van Graafeiland, and Meskill. At the conclusion of oral argument, the motion was denied in an oral opinion delivered by Judge Mansfield, a transcript of which is in the record before me.

[2] Although applicants have specifically addressed this application to me as Circuit Justice for the Second Circuit, and have not requested my disqualification, I note that they do suggest that "any judges who sat on any of the appeals of the Rosenbergs would very likely conclude that they should disqualify themselves from the current appeal." Application ¶ 11. I was a member of a Second Circuit panel, along with Judges Swan and Friendly, which denied postconviction relief to Rosenberg codefendant Morton Sobell. *United States* v. *Sobell,* 314 F. 2d 314 (CA2), cert. denied, 374 U. S. 857 (1963). Despite this, I will not disqualify myself from ruling on the instant application. I do not believe that my "impartiality" to decide the extent of a Circuit Justice's powers under § 291 (a) "might reasonably be questioned," 28 U. S. C. § 455 (a) (1970 ed., Supp. V), in light of this participation in a case not related to the present action.

As far as I can determine, 28 U. S. C. § 291 (a)[3] has never been construed by this Court, although it is often used to assign judges to temporary duty on the courts of appeals. Generally such assignments are made to assist a circuit with a heavy workload, although assignments have been made where an entire court of appeals has disqualified itself from hearing a case. See, *e. g., United States* v. *Isaacs,* 493 F. 2d 1124, 1167–1168 (CA7), cert. denied, 417 U. S. 976 (1974); cf. *United States* v. *Manton,* 107 F. 2d 834 (CA2 1939), cert. denied, 309 U. S. 664 (1940). In such cases, however, the circuit judges themselves make the decision not to sit, thereby making it impossible to designate a panel to hear an appeal, and causing the "need" under § 291 (a) for the issuance of a certificate of necessity. Such need is plain to anyone looking at the situation, and the duty to issue the certificate must be considered purely a ministerial act to deal with an administrative problem, whether performed by the chief judge of the circuit or the circuit justice. See "An Act to amend the Judicial Code to authorize the Chief Justice of the United States to assign circuit judges to temporary duty in circuits other than their own," 56 Stat. 1094; H. R. Rep. No. 2501, 77th Cong., 2d Sess. (1942); S. Rep. No. 1606, 77th Cong., 2d Sess. (1942).

Because § 291 (a) deals with a purely administrative matter, it would be inappropriate for me to rule in the context of an application under it that all of the judges of the Second Circuit are as a matter of law disqualified from hearing applicants' appeal. At best that question could be addressed only by the full Court. Cf. *Locks* v. *Commanding General,* 89 S. Ct. 31, 21 L. Ed. 2d 78 (1968) (Douglas, J., in chambers). Sitting as a Circuit Justice, I simply do not have the power to unseat all of the judges of a court of appeals in a particular case absent any showing that they have recused themselves.

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[3] Section 291 (a) provides:

"The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises."

Applicants move in the alternative for transfer of their appeal to another court of appeals. They have cited no statutory or case authority even intimating that a Circuit Justice may exercise any such far-reaching power. See *MacNeil Bros. Co.* v. *Cohen*, 264 F. 2d 186 (CA1 1959).

The application is denied in all respects.

# HOUCHINS, SHERIFF OF THE COUNTY OF ALAMEDA, CALIFORNIA *v.* KQED, INC., ET AL.

## ON APPLICATION FOR STAY

No. A-594. Decided February 1, 1977

Application by a county sheriff for stay of the District Court's injunction granting personnel of respondent television-radio station and other news media representatives access to the county jail, is granted pending applicant's timely filing of a petition for certiorari and disposition thereof by this Court. The issue to be raised in the petition as to whether the doctrine of *Pell* v. *Procunier,* 417 U. S. 817, and *Saxbe* v. *Washington Post Co.,* 417 U. S. 843, that the press is entitled to no greater access to a jail than the public applies to this case is of sufficient importance to surmount the threshold barrier confronting stay applications, *viz.,* reasonable likelihood that the petition for certiorari will be granted.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Houchins is the Sheriff of Alameda County in the State of California and in that capacity controls access of the press and public to the Alameda County jail. Respondents KQED, Inc., a nonprofit educational television-radio station, and the Alameda and Oakland branches of the NAACP, sued applicant in the United States District Court for the Northern District of California in order to obtain an injunction granting KQED personnel access to the Alameda County jail at Santa Rita. The District Court granted respondents a preliminary injunction on November 20, 1975, which restrained applicant

> "from excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.

> ". . . [F]rom denying KQED news personnel and responsible representatives of the news media access to the Santa Rita facilities, including Greystone, at reasonable times and hours.
>
> ". . . [F]rom preventing KQED news personnel and responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities.
>
> ". . . [Applicant] may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous."

Applicant sought a stay of this order in the Court of Appeals for the Ninth Circuit, and a two-judge panel of the court granted the stay on December 24, 1975, observing:

> "[T]he injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell* v. *Procunier*, 417 U. S. 817 (1974) and *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay."

Applicant's appeal was thereafter heard by a different panel of the Court of Appeals which affirmed the order of the District Court. Applicant filed a petition for rehearing and suggestion for rehearing en banc, and a motion for stay of mandate, all of which were denied. He now requests that I stay the injunction pending the filing and disposition of a petition for certiorari to review the judgment of the Court of Appeals. For the reasons set forth below, I grant his application.

The dispute between the parties centers upon questions of law, rather than of fact. The principal dispute involves the interpretation of our opinion in *Pell* v. *Procunier,* 417 U. S. 817 (1974). Applicant would urge that we reach the same result in this case as we did in *Saxbe* v. *Washington Post Co.,* 417 U. S. 843, 850 (1974):

> "We find this case constitutionally indistinguishable from *Pell* v. *Procunier, ante,* p. 817, and thus fully controlled by the holding in that case. '[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.' *Id.,* at 834."

Respondents, on the other hand, rely upon the Court's observation at the outset of the opinion in *Pell* that the prison regulation there involved was

> "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions. . . . In short, members of the press enjoy access to California prisons that is not available to other members of the public." *Pell, supra,* at 830-831. (Footnote omitted.)

Concededly the access of the public and the press to the Alameda County jail is less than was their access to the California prisons in *Pell.* Public access to the Alameda County jail at Santa Rita presently consists of monthly public tours which, in the words of the Court of Appeals, "were limited to 25 people, booked months in advance, prohibited use of cameras or sound equipment, prohibited conversations with inmates, and omitted views of many parts of the jail, including the notorious Greystone Building." Here the injunction did grant to the press greater[1] access to the jail than the public is granted, a result seemingly inconsistent with our holding[2] in *Pell* that the press is not entitled to greater access. But respondents suggest that the access given to the press in this case by the injunction may, as a factual matter, not significantly exceed that given to the press in *Pell* before the injunction and after our disposition of that case.

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[1] See 546 F. 2d 284, 294 (CA9 1976) (Duniway, J., concurring).

The Court of Appeals struggled with the resolution of this issue. Judges Chambers and Sneed, in granting the stay before argument, felt that the injunction went beyond that which we countenanced in *Pell*. The panel that decided the issue on the merits unanimously affirmed the District Court, but each member of the panel wrote separately. In discussing the injunction, which he felt clearly granted the press greater access than is granted to the public, Judge Duniway, in his concurring opinion, was moved to conclude:

> "I cannot reconcile this result [the injunction] with the decisions in *Pell, supra,* and *Washington Post, supra.*" 546 F. 2d 284, 294 (CA9 1976).

Judge Hufstedler, concurring specially, viewed the reconciliation of the injunction in this case with the holdings in *Pell* and *Washington Post* as a "thorny question." *Id.*, at 19.

The legal issue to be raised by applicant's petition for certiorari seems quite clear. If the "no greater access" doctrine of *Pell* and *Saxbe* applies to this case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases, would be appropriate, although not necessary. In my opinion at least four Justices of this Court would vote to grant certiorari to resolve this issue, if for no other reason than that departure from unequivocal language in one of our opinions which on its face appears to govern the question ought to be undertaken in the first instance by this Court, rather than by the Court of Appeals or by the District Court.

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[2] See *Saxbe* v. *Washington Post Co.*, 417 U. S., at 850.

Of course, I accord due deference to the judges of the Ninth Circuit who declined to grant the stay. See *Winters* v. *United States*, 89 S. Ct. 57, 21 L. Ed. 2d 80 (1968) (Douglas, J., in chambers). But such deference does not relieve me of the obligation to decide the issue:

> "Although a judge of the panel which entered this order refused to grant a stay, I would nevertheless stay the order if persuaded by the record that the questions presented for review in the petition for certiorari had sufficient merit to make review by this Court likely." *Board of School Comm'rs of Mobile County* v. *Davis*, 84 S. Ct. 10, 11, 11 L. Ed. 2d 26, 27 (1963) (Black, J., in chambers).

For the reasons set forth above, I think that the issue in this case is of sufficient importance to surmount the threshold barrier confronting all stay applications: reasonable likelihood that the petition for certiorari will be granted. *E. g.*, *English* v. *Cunningham*, 80 S. Ct. 18, 4 L. Ed. 2d 42 (1959) (Frankfurter, J., in chambers).

Respondents suggest that, regardless of the correctness of the decision below, the equities do not favor the applicant, and that it is they, the respondents, who will suffer the irreparable injury should a stay be granted. Respondents contend that they are irreparably injured each time they are denied news coverage; applicant suggests that in the District Court hearing "there was uncontradicted evidence that jail operations come to a virtual standstill in the presence of a media tour." Respondents' intimation that the interim denial of their access to the prison, in violation of their asserted First and Fourteenth Amendment rights, will inexorably injure them in a way that applicant cannot be injured by the injunctive restraint—which he asserts is based on a misapprehension of the Constitution—is one with which I cannot agree. There are equities on both sides of the case.

I would be more hesitant to disturb the District Court's preliminary injunction if it were evident that the injunction were actually "preliminary" to substantial further proceedings which might substantially modify that injunction. But the injunction was issued some 15 months ago, after a full evidentiary hearing, and none of the parties suggests that there are any new factual or legal issues which would cause the District Court to modify it. The injunction has in fact been stayed virtually since its issuance, and I conclude that, in light of the present posture of the case and given the substantial chance that the petition for certiorari will be granted, the preservation of that status quo is an important factor favoring a stay. This is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time. See *Edelman* v. *Jordan,* 414 U. S. 1301, 1303 (1973) (REHNQUIST, J., in chambers).

The preliminary injunction issued by the District Court in this case on November 20, 1975, should therefore be and hereby is stayed pending the filing of a timely petition for certiorari by applicant, and the disposition of the petition and the case by this Court.

# MARSHALL, SECRETARY OF LABOR v. BARLOW'S, INC.

### ON APPLICATION FOR STAY

No. A-600. Decided February 3, 1977

Application by the Secretary of Labor for stay of a three-judge District Court's injunction against further searches pursuant to § 8 (a) of the Occupational Safety and Health Act, which allows warrantless entry and inspection of work places for OSHA violations, is granted, pending the timely filing of an appeal and the disposition thereof by this Court, insofar as it affects persons other than respondent. The Act, being presumptively constitutional, should remain in effect pending this Court's final decision on the merits.

MR. JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General, on behalf of the Secretary of Labor, applies for a partial stay of an injunction issued by a three-judge District Court for the District of Idaho. That court held that § 8 (a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U. S. C. § 657 (a), allowing warrantless entry and inspection of work places for OSHA violations, is in conflict with the Fourth Amendment of the United States Constitution, and enjoined further searches by the Secretary's representative pursuant to that section. The applicant does not seek a stay of the order insofar as it protects the respondent from future searches, but only as it protects persons not party to this suit. On January 25, 1977, I granted a stay of the order to the extent that the order restrains the applicant's conduct outside of the District of Idaho.

Upon consideration of the response subsequently filed, I now grant in full the applicant's request for a stay of the three-judge court order as it affects persons other than the respondent. On the merits of the Fourth Amendment question, the District Court relied on our decisions in *Camara* v.

*Municipal Court,* 387 U. S. 523 (1967), and *See* v. *City of Seattle,* 387 U. S. 541 (1967). The applicant relies on our decisions in *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72 (1970), and *United States* v. *Biswell,* 406 U. S. 311 (1972), to urge a contrary result. The proposed stay will not affect the respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. In such a situation, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court.

The Secretary's application for a stay is accordingly granted pending the timely filing of a notice of appeal and jurisdictional statement, and the disposition of the same by this Court.

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**APPEALS**—Continued.

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**CIVIL RIGHTS ACT OF 1964**—Continued.

disability benefits plan is less than all inclusive. Petitioner's plan is no more than an insurance package covering some risks but excluding others and there has been no showing that selection of included risks creates a gender-based discriminatory effect. General Electric Co. v. Gilbert, p. 125.

2. *Filing of charge with Equal Employment Opportunity Commission—Limitations period—Application of enlarged period to pending charge.*—1972 amendments to Act extending from 90 to 180 days period for filing unlawful employment practice charge with EEOC and their legislative history demonstrate that Congress intended to apply 180-day period to a charge such as that filed by petitioner where charge was filed with EEOC before these amendments became effective, were still pending when amendments became effective, and alleged a discriminatory occurrence within 180 days of enactment of amendments. Electrical Workers v. Robbins & Myers, Inc., p. 229.

3. *Filing of charge with Equal Employment Opportunity Commission—Limitations period—Effect of grievance procedures.*—Existence and utilization of grievance procedures under collective-bargaining agreement does not toll running of limitations period for filing unlawful-firing charge with EEOC that would otherwise begin on date of firing, Title VII remedies being independent of other pre-existing remedies available to an aggrieved employee. Electrical Workers v. Robbins & Myers, Inc., p. 229.

**CLASSIFICATIONS.** See **Constitutional Law,** II, 1.

**CLAYTON ACT.** See **Antitrust Acts,** 1; **Federal Rules of Civil Procedure.**

**COLLECTIVE-BARGAINING AGREEMENTS.** See **Civil Rights Act of 1964,** 3; **Constitutional Law,** VII, 1, 2; **Davis-Bacon Act; Federal-State Relations,** 1; **Labor Management Relations Act; National Labor Relations Act,** 2.

**COLUMBIA RIVER BASIN.** See **States.**

**COMMERCE CLAUSE.** See **Constitutional Law,** I.

**COMMITMENT FOR CONTEMPT.** See **Stays,** 2.

**COMMUNIST PARTY.** See **Injunctions,** 1.

**COMMUTING EXPENSES AS DEDUCTIBLE FROM FOOD STAMP RECIPIENTS' INCOME.** See **Constitutional Law,** V, 1; **Food Stamp Act of 1964.**

**COMPELLING NECESSITY FOR STAY.** See **Stays,** 1.

**COMPUTERIZED FILES OF PATIENTS OBTAINING PRESCRIPTION DRUGS.** See **Constitutional Law,** II, 3; IX; **Physicians.**

**CONDUCT PROTECTED BY FIRST AMENDMENT.** See **Constitutional Law,** VII, 3.

**CONFESSIONS.** See **Constitutional Law,** X; **Evidence,** 1.

**CONNECTICUT.** See **Injunctions,** 1.

**CONSERVANCY DISTRICTS.** See **Procedure,** 1.

**CONSTITUTIONAL LAW.** See also **Federal-State Relations,** 4; **Jurisdiction; Limitation of Actions; Mootness; Procedure,** 1, 2, 4; **Standing to Sue.**

**I. Commerce Clause.**

*State transfer tax on securities transactions—Heavier tax on transactions involving out-of-state sale.*—Amendment to New York statute imposing a transfer tax on securities transactions if part of transaction occurs in New York so as to impose heavier tax on transactions involving an out-of-state sale than on most transactions involving an in-state sale, discriminates against interstate commerce in violation of Commerce Clause. Boston Stock Exchange v. State Tax Comm'n, p. 318.

**II. Due Process.**

1. *Fifth Amendment—Equal protection of the laws—Social Security Act—Divorced woman's benefits.*—Statutory classification of § 202 (b)(1) of Social Security Act whereby a married woman under 62 whose husband retires or becomes disabled is granted monthly benefits under Act if she has a minor or other dependent child in her care, but a divorced woman under 62 whose ex-husband retires or becomes disabled does not receive such benefits, does not violate Due Process Clause of Fifth Amendment. Mathews v. De Castro, p. 181.

2. *Parole violation—Right to parole revocation hearing.*—Petitioner federal parolee, who is imprisoned for federal crimes committed while on parole and clearly constituting parole violations, is not constitutionally entitled to an immediate parole revocation hearing, where a parole violator warrant was issued and lodged with institution of his confinement as a "detainer" but was not executed. Moody v. Daggett, p. 78.

3. *Protected right or liberty—Prescription drugs—Patient identification requirement.*—Neither immediate nor threatened impact of requirement of New York statute that identification of patients obtaining prescription drugs be recorded in centralized state health department computer file on either reputation or independence of patients for whom most dangerous legitimate drugs are medically indicated suffices to constitute an invasion of any right or liberty protected by Fourteenth Amendment. Whalen v. Roe, p. 589.

4. *Right to fair trial—Accused's pretrial right to names of undercover agents or other prosecution witnesses.*—Due Process Clause of Fourteenth

**CONSTITUTIONAL LAW**—Continued.

Amendment does not require that prosecution reveal before trial names of undercover agents or other witnesses who will testify unfavorably to defense. That petitioner undercover agent, who was prosecution witness at respondent's state criminal trial, not only concealed his identity but represented to respondent before trial that he would not be a prosecution witness did not deny respondent a right to a fair trial. Misrepresentation was not deliberate, and there is no constitutional difference between surprise testimony of an informer who is not suspected and therefore is not asked about testifying for prosecution and informer who, like petitioner, is asked by defendant but denies that he will testify. Weatherford v. Bursey, p. 545.

**III. Eighth Amendment.**

*Cruel and unusual punishment—Inadequate medical care for prisoner.*—Deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening Eighth Amendment. Here, however, respondent state inmate's claims against petitioner physician and corrections department medical director for inadequate treatment of a back injury do not suggest such indifference, allegations revealing that such physician and other medical personnel saw respondent on 17 occasions during a 3-month span and treated his injury and other problems. Failure to perform an X-ray or to use additional diagnostic techniques does not constitute cruel and unusual punishment but is at most medical malpractice cognizable in state courts. Estelle v. Gamble, p. 97.

**IV. Eleventh Amendment.**

*Immunity from suit—School board.*—Since under Ohio law "State" does not include "political subdivisions" (a category including school districts) and record shows that a local school board in Ohio like petitioner is more like a county or city than it is an arm of State, petitioner is not immune from suit under Eleventh Amendment. Mt. Healthy City Board of Ed. v. Doyle, p. 274.

**V. Equal Protection of the Laws.**

1. *Food stamp recipients' income—Disallowance of deduction for transportation expenses.*—Federal and state regulations that disallow a deduction for transportation expenses in connection with a job training program for purposes of computing income of food stamp recipients do not deny equal protection or due process. Knebel v. Hein, p. 288.

2. *Prohibition against sale of beer—Gender-based differential—Invidious discrimination.*—Gender-based differential in Oklahoma statutory scheme prohibiting sale of 3.2% beer to males under age of 21 and to females under age of 18, constitutes invidious discrimination against males 18–20

**CONSTITUTIONAL LAW**—Continued.

years of age in violation of Equal Protection Clause of Fourteenth Amendment. Appellees' statistics (most relevant of which show only that .18% of females and 2% of males in 18–20-year-old age group were arrested for driving under influence of liquor) do not warrant conclusion that sex represents an accurate proxy for regulation of drinking and driving. Craig v. Boren, p. 190.

3. *Racially discriminatory intent or purpose—Burden of proof—Denial of rezoning for housing project.*—Proof of racially discriminatory intent or purpose is required to show a violation of Equal Protection Clause of Fourteenth Amendment, and respondents failed to carry their burden of proving that such an intent or purpose was motivating factor in petitioner village's denial of rezoning necessary for respondent developer to build racially integrated low- and moderate-income housing project. Arlington Heights v. Metropolitan Housing Corp., p. 252.

**VI. Fifth Amendment.**

1. *Double jeopardy—Bench trial—Finding of guilt—Dismissal of indictment—Government appeal.*—Double jeopardy does not bar Government's appeal from District Court's dismissal of indictment occurring after that court's general finding of guilt in a bench trial. United States v. Kopp, p. 121.

2. *Double jeopardy—Bench trial—Finding of guilt—Subsequent suppression of evidence—Government appeal.*—District Court's general finding of guilt in a bench trial is for double jeopardy purposes same as a jury verdict of guilty. Government is therefore entitled, pursuant to Criminal Appeals Act, to appeal District Court's subsequent order suppressing certain evidence on reconsideration of respondent's pretrial motion, which was originally denied, since success on that appeal would result in reinstatement of District Court's general finding of guilt, rather than in further factual proceedings relating to guilt or innocence. United States v. Morrison, p. 1.

3. *Double jeopardy—Bench trial—Finding of guilt—Subsequent suppression of evidence—Government appeal.*—After District Court had found respondent guilty at a bench trial, double jeopardy does not bar Government's appeal from District Court's order suppressing certain evidence, entered upon reconsideration of respondent's motion to suppress, which was originally denied. United States v. Rose, p. 5.

4. *Double jeopardy—Hung jury—Mistrial—Dismissal of indictment—Governnment appeal.*—Where District Court, because of a hung jury, declared a mistrial on indictment against respondents, Double Jeopardy Clause of Fifth Amendment does not bar a retrial, and hence Government is entitled under Criminal Appeals Act to appeal from District Court's

**CONSTITUTIONAL LAW**—Continued.

subsequent dismissal of indictment on respondents' motion, since dismissal was prior to a trial that Government had a right to prosecute and respondents were required to defend. United States v. Sanford, p. 14.

**VII. First Amendment.**

1. *Freedom of speech—Prior restraint—Labor negotiations—School board and teachers' union—Open board meeting—Curtailing nonunion teachers from speaking.*—Where a nonunion teacher, over union objection, addressed at open meeting of appellant Board of Education, one topic (union's demand for a "fair share" clause) of pending labor negotiations between Board and union, and it does not appear that teacher, although his views were not consistent with those of union, sought to bargain or offered to enter into any bargain with Board or that he was authorized by any other teachers to enter into any agreement on their behalf, circumstances do not present such danger to labor-management relations as to justify appellee Wisconsin Employment Relations Commission, on union's complaint, ordering Board to immediately cease and desist from permitting any employees but union officials to appear and speak at Board meetings on matters subject to collective bargaining. Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, p. 167.

2. *Freedom of speech—Prior restraint—Teachers' expressions to school board.*—Appellee Wisconsin Employment Relations Commission's order that appellant Board of Education immediately cease and desist from permitting any employees but union officials to appear and speak at open Board meetings on matters subject to collective bargaining, being designed to govern speech and conduct in future and not merely to punish past conduct, is an improper prior restraint on teachers' expressions to Board on matters involving operation of schools. Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, p. 167.

3. *Freedom of speech—Refusal to rehire teacher.*—Respondent teacher's claims that petitioner school board's refusal to rehire him violated his rights under First and Fourteenth Amendment are not defeated because he did not have tenure. Mt. Healthy City Board of Ed. v. Doyle, p. 274.

4. *Freedom of speech—Teacher's protected conduct—Refusal to rehire—Remedy.*—That conduct protected by First and Fourteenth Amendments played substantial part in decision not to rehire respondent teacher does not necessarily amount to a constitutional violation justifying remedial action. Proper test is one that protects against invasion of constitutional rights without commanding undesirable consequences not necessary to assurance of those rights. Since respondent here satisfied burden of showing that his conduct was constitutionally protected and was a motivating factor in petitioner school board's decision not to rehire him, District Court

**CONSTITUTIONAL LAW**—Continued.

should have gone on to determine whether petitioner had shown by a preponderance of evidence that it would have reached same decision even in absence of protected conduct. Mt. Healthy City Board of Ed. v. Doyle, p. 274.

**VIII. Fourth Amendment.**

1. *Search and seizure—Warrantless entry into business premises—Seizures to satisfy tax assessments.*—Internal Revenue agents' warrantless entry into privacy of petitioner corporation's office to seize property in satisfaction of jeopardy income-tax assessments against taxpayer for whom petitioner was alter ego, violated Fourth Amendment, since "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Business premises are protected by Fourth Amendment, and corporations have Fourth Amendment rights. G. M. Leasing Corp. v. United States, p. 338.

2. *Search and seizure—Warrantless seizures of automobiles to satisfy tax assessment.*—Internal Revenue agents' warrantless seizures of petitioner corporation's automobiles in partial satisfaction of jeopardy income-tax assessments against taxpayer for whom petitioner was alter ego, involved no invasion of privacy and were not unconstitutional, where seizures occurred in public streets, parking lots, or other open areas. G. M. Leasing Corp. v. United States, p. 338.

3. *Search warrants—Justice of peace—Fees for issuance.*—A justice of peace's issuance of a search warrant to search appellant's house, pursuant to Georgia statutory scheme whereby a justice of peace, who is not salaried, is paid a prescribed fee for *issuance* of each warrant but receives nothing for his *denial* of a warrant, effects a violation of protections afforded appellant by Fourth and Fourteenth Amendments. Connally v. Georgia, p. 245.

**IX. Police Powers.**

*Prescription drugs—Patient identification requirement.*—Requirement of New York statute that identification of patients obtaining prescription drugs be recorded in centralized state health department computer file, is a reasonable exercise of State's broad police powers, and District Court's finding that necessity for requirement had not been proved is not a sufficient reason for holding statute unconstitutional. Whalen v. Roe, p. 589.

**X. Self-incrimination.**

*Confession—Lack of custody—Necessity for Miranda warnings.*—Where respondent in response to police officer's request voluntarily came to a police station for questioning about a burglary and was immediately

**CONSTITUTIONAL LAW**—Continued.

informed that he was not under arrest, and at close of a half-hour interview left station without hindrance, respondent was not in custody "or otherwise deprived of his freedom of action in any significant way," so as to require that his confession to burglary obtained during such interview be suppressed at his state criminal trial because he was not given *Miranda* warnings prior to being questioned. Oregon v. Mathiason, p. 492.

**XI. Sixth Amendment.**

*Right to counsel—Effect of undercover agent's pretrial meetings with accused's counsel.*—Fact that petitioner undercover agent, who was arrested with respondent for a state criminal offense and subsequently was a prosecution witness at respondent's trial, participated in two pretrial meetings with respondent and respondent's counsel did not deprive respondent of his right to counsel under Sixth Amendment, which does not establish a *per se* rule forbidding an undercover agent to meet with a defendant's counsel. As long as information possessed by petitioner about two meetings remained uncommunicated to his superiors or to prosecution, he posed no threat to respondent's Sixth Amendment rights. Weatherford v. Bursey, p. 545.

**XII. Supremacy Clause.**

*County tax on federal employees' possessory interests in Government-owned housing.*—Tax imposed by appellee California counties on possessory interests of appellant United States Forest Service employees in housing located in National Forests within counties and owned and supplied to appellants by Forest Service as part of their compensation, is not barred by Supremacy Clause as a state tax on Federal Government or federal property. United States v. County of Fresno, p. 452.

**XIII. Twenty-first Amendment.**

*Prohibition against sale of beer—Gender-based differential—Equal protection of the laws.*—Operation of Twenty-first Amendment, which prohibits transportation or importation into any State for delivery or use therein of intoxicating liquors, in violation of laws thereof, does not alter application of equal protection standards that otherwise govern case challenging, on equal protection grounds, Oklahoma statutory scheme prohibiting sale of 3.2% beer to males under age of 21 and to females under age of 18. Court has never recognized that application of that Amendment can defeat an otherwise established claim under Equal Protection Clause of Fourteenth Amendment, principles of which cannot be rendered inapplicable here by reliance upon statistically measured but loose-fitting generalities concerning drinking tendencies of aggregate groups. Craig v. Boren, p. 190.

**CONSTRUCTION OF CONTRACTS.** See **Federal-State Relations,** 1.

**CONTEMPT.** See **Stays,** 2.

**CONTRACTS.** See **Federal-State Relations,** 1.

**CONTRIBUTIONS TO TRUST FUNDS FOR EMPLOYEES.** See **Davis-Bacon Act; Internal Revenue Code,** 1; **Labor Management Relations Act.**

**CORPORATIONS AS PROTECTED BY FOURTH AMENDMENT.** See **Constitutional Law,** VIII, 1, 2.

**COUNTY USE OR PROPERTY TAXES.** See **Constitutional Law,** XII.

**COURTS OF APPEALS.** See **Judges.**

**CREDIT MARKET.** See **Antitrust Acts,** 1.

**CRIMINAL APPEALS ACT.** See **Appeals,** 1, 2; **Constitutional Law,** VI.

**CRIMINAL LAW.** See also **Appeals,** 2; **Constitutional Law,** II, 2, 4; VI; VIII, 3; X; XI; **Evidence; Omnibus Crime Control and Safe Streets Act of 1968; Stays,** 1.

1. *Death sentence—Exclusion of juror expressing scruples against death penalty.*—Petitioner's death sentence for murder cannot be carried out where one prospective juror was excluded from jury for cause merely for expressing scruples against death penalty, rather than being irrevocably committed to vote against it. Davis v. Georgia, p. 122.

2. *Willful filing of false income tax returns—Jury instructions on willfulness.*—At respondents' trial on a charge of willfully filing false income tax returns in violation of § 7206 (1) of Internal Revenue Code, District Court adequately instructed jury on willfulness in accordance with standard that willfulness in context of § 7206 and related statutes simply means a voluntary, intentional violation of a known legal duty, and hence an additional instruction on good faith was unnecessary. United States v. Pomponio, p. 10.

**CRUEL AND UNUSUAL PUNISHMENT.** See **Constitutional Law,** III.

**CUSTODY REQUIRING MIRANDA WARNINGS.** See **Constitutional Law,** X.

**DAMAGES.** See **Antitrust Acts,** 1; **Federal Rules of Civil Procedure; Jurisdiction,** 1.

**DAVIS-BACON ACT.**

*Collective-bargaining agreement—Subcontractor's clause—Contributions to trust funds—Objective of Act.*—Objective of Act to protect contractors'

**DAVIS-BACON ACT**—Continued.
employees from substandard earnings by fixing floor under wages on Government projects, is not "frustrated" by clause in collective-bargaining agreement between petitioner general contractor, who subcontracted certain carpentry work on Government project, and a carpenters' union, requiring petitioner to pay contributions to certain trust funds with respect to hours of carpentry work performed by employees of nonsignatory subcontractor. Such objective is clearly not "frustrated" when contractual arrangements between employers and their employees result in higher compensation and benefits than floor established by Act. Walsh v. Schlecht, p. 401.

**DEATH PENALTY.** See **Criminal Law,** 1; **Stays,** 5.

**DECLARATORY JUDGMENTS.** See **Mootness.**

**DENIAL OF PERMANENT RESIDENCE TO ALIENS.** See **Aliens.**

**DETAINERS.** See **Constitutional Law,** II, 2.

**DIRECT APPEALS.** See **Stays,** 3.

**DISABILITY BENEFITS PLANS.** See **Civil Rights Act of 1964,** 1.

**DISCHARGE OF EMPLOYEES.** See **Civil Rights Act of 1964,** 3.

**DISCOVERY.** See **Constitutional Law,** II, 4; XI.

**DISCRETIONARY DENIAL OF PERMANENT RESIDENCE TO ALIENS.** See **Aliens.**

**DISCRIMINATION.** See **Civil Rights Act of 1964,** 1, 2; **Constitutional Law,** V, 2, 3; XIII; **Mootness; Standing to Sue.**

**DISCRIMINATORY STATE TAXES.** See **Constitutional Law,** I.

**DISMISSAL OF APPEALS.** See **Appeals,** 1, 3.

**DISMISSAL OF CERTIORARI.** See **Certiorari.**

**DISMISSAL OF EMPLOYEES.** See **Procedure,** 2.

**DISMISSAL OF INDICTMENTS.** See **Appeals,** 2; **Constitutional Law,** VI, 4.

**DISQUALIFICATON OF CIRCUIT JUDGES.** See **Judges.**

**DISTRICT COURTS.** See **Constitutional Law,** VI, 1–3; **Jurisdiction,** 1; **Procedure,** 1, 3; **Stays,** 4; **Voting Rights Act of 1965.**

**DIVORCED WIVES' SOCIAL SECURITY BENEFITS.** See **Constitutional Law,** II, 1.

**DOUBLE JEOPARDY.** See **Constitutional Law,** VI.

**DRUGS.** See **Constitutional Law,** II, 3; IX; **Physicians.**

**DUE PROCESS.** See **Constitutional Law, II; Procedure, 2.**

**ECONOMIC POWER IN CREDIT MARKET.** See **Antitrust Acts, 1.**

**EDITORS.** See **Stays, 2.**

**EIGHTH AMENDMENT.** See **Constitutional Law, III.**

**ELECTION OF UNION OFFICERS.** See **Labor-Management Reporting and Disclosure Act of 1959.**

**ELECTIONS.** See **Injunctions; Voting Rights Act of 1965.**

**ELECTRONIC SURVEILLANCE.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**ELEVENTH AMENDMENT.** See **Constitutional Law, IV**

**ELIGIBILITY FOR UNION OFFICE.** See **Labor-Management Reporting and Disclosure Act of 1959.**

**EMPLOYEES OF UNITED STATES FOREST SERVICE.** See **Constitutional Law, XII.**

**EMPLOYEES' PROFIT-SHARING TRUSTS.** See **Internal Revenue Code, 1**

**EMPLOYEES WITHIN NATIONAL LABOR RELATIONS ACT.** See **National Labor Relations Act, 1.**

**EMPLOYER AND EMPLOYEES.** See **Civil Rights Act of 1964; Constitutional Law, VII, 3, 4; Davis-Bacon Act; Federal-State Relations, 1; Internal Revenue Code, 1; Jurisdiction; Labor Management Relations Act; National Labor Relations Act; Procedure, 2.**

**EMPLOYMENT PRACTICES.** See **Civil Rights Act of 1964.**

**ENVIRONMENTAL IMPACT STATEMENTS.** See **Stays, 9.**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.** See **Civil Rights Act of 1964, 2, 3**

**EQUAL-FOOTING DOCTRINE.** See **Federal-State Relations, 2.**

**EQUAL PROTECTION OF THE LAWS.** See **Constitutional Law, II, 1; V; XIII; Mootness; Standing to Sue.**

**EVIDENCE.**

1. *Confession—Admissibility—Voluntariness.*—Respondent's confession to a crime was not *per se* inadmissible at his criminal trial as being involuntary merely because it was made as a result of an agreed-upon but unexecuted plea bargain that did not call for such a confession. Where confession does not appear to have been result of "any direct or implied

**EVIDENCE**—Continued.
promises" or any coercion on prosecution's part, it was not involuntary. Hutto v. Ross, p. 28.

2. *Finding of guilt—Hearsay evidence—Harmless error.*—It was error for trial judge in a bench trial to rely upon wrongfully admitted hearsay evidence in finding petitioner guilty of a federal narcotics offense, but where judge did not find petitioner guilty on this evidence alone, case is remanded to Court of Appeals to determine whether wrongful admission of hearsay evidence was harmless error, and if not, whether petitioner waived objection to it. Moore v. United States, p. 20.

**EVIDENCE DERIVED FROM WIRETAPS.** See **Omnibus Crime Control and Safe Streets Act of 1968,** 1–3.

**EXCEPTIONAL CIRCUMSTANCES WARRANTING VACATION OF STAY.** See **Stays,** 9.

**EXCLUSION OF PREGNANCY FROM DISABILITY BENEFITS.** See **Civil Rights Act of 1964,** 1.

**EXCLUSION OF PROSPECTIVE JURORS.** See **Criminal Law,** 1.

**EXECUTIONS.** See **Stays,** 5.

**FAILURE TO PRESERVE ISSUE.** See **Jurisdiction,** 2.

**FAILURE TO RAISE QUESTION IN COURT BELOW.** See **Procedure,** 2.

**FAIR HOUSING ACT OF 1968.** See **Standing to Sue,** 2.

**"FAIR SHARE" CLAUSES.** See **Constitutional Law,** VII, 1.

**FALSE INCOME TAX RETURNS.** See **Criminal Law,** 2.

**FEDERAL COMMON LAW.** See **Federal-State Relations,** 2.

**FEDERAL GOVERNMENT'S IMMUNITY FROM STATE TAXATION.** See **Constitutional Law,** XII.

**FEDERAL LAW AS GOVERNING CONSTRUCTION OF COLLECTIVE-BARGAINING AGREEMENTS.** See **Federal-State Relations,** 1.

**FEDERAL PAROLEES.** See **Constitutional Law,** II, 2.

**FEDERAL-QUESTION JURISDICTION.** See **Jurisdiction.**

**FEDERAL RULES OF APPELLATE PROCEDURE.** See **Appeals,** 2.

**FEDERAL RULES OF CIVIL PROCEDURE.** See also **Procedure,** 3.

*Antitrust action—Treble damages—Judgment notwithstanding verdict.*—Petitioner bowling equipment manufacturer and bowling center operator, in action against it by respondent bowling center operators for treble damages under Clayton Act, is entitled under Rule 50 (b) to judgment on

**FEDERAL RULES OF CIVIL PROCEDURE**—Continued.

damages claim notwithstanding verdict, since respondents' case was based solely on their novel theory, rejected herein, of damages ascribable to profits they would have received had competing bowling centers, which were acquired by petitioner when they defaulted in payments for bowling equipment, been closed, and since respondents have not shown any reason to require a new trial. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., p. 477.

**FEDERAL-STATE RELATIONS.** See also **Constitutional Law,** I; XII; **Food Stamp Act of 1964; Stays,** 8.

1. *Collective-bargaining agreement — Subcontractor's clause — Federal rather than state law as governing meaning.*—Federal rather than state law principles of contract construction apply in determining meaning of subcontractor's clause in collective-bargaining agreement between petitioner general contractor and a carpenters' union, since such clause is a provision of a collective-bargaining agreement and application of federal law is necessary to avoid "possibility that individual contract terms might have different meanings under state and federal law." Walsh v. Schlecht, p. 401.

2. *Disputed ownership of riverbed lands—State against private corporation—State law, and not federal common law, as governing.*—Dispute between State of Oregon and Oregon corporation over ownership of land underlying Willamette River, which is navigable but not an interstate boundary, should be decided solely as a matter of Oregon law and not by federal common law, since application of federal common law is required neither by equal-footing doctrine nor by any other principle of federal law. Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., p. 363.

3. *State-law question—Absence of controlling state decision—Certification to state court.*—Question whether Massachusetts law authorizes Massachusetts Attorney General to appeal from Federal District Court's judgment against certain state officers he represented in that court notwithstanding their expressed opposition to appeal, is certified to Massachusetts Supreme Judicial Court in absence of any clearly controlling decision on question by that court. Massachusetts v. Feeney, p. 66.

4. *Tax Injunction Act—Bar to injunctive relief against state sales tax assessment.*—Tax Injunction Act, 28 U. S. C. § 1341, which prohibits federal district courts from enjoining assessment, levy, or collection of state taxes where "a plain, speedy and efficient remedy may be had in the courts of such State," bars appellee Vermont furniture store's suit in Federal District Court for injunctive relief against allegedly unconstitutional assessment of New York sales taxes on appellee's sales to New York customers, since New York provides a "plain, speedy and efficient" means for redress of appellee's constitutional claims while preserving right to challenge amount of taxes due. Tully v. Griffin, Inc., p. 68.

**FEES FOR ISSUANCE OF SEARCH WARRANTS.** See **Constitutional Law,** VIII, 3.

**FIFTH AMENDMENT.** See **Constitutional Law,** II, 1; VI.

**FINALITY OF JUDGMENT.** See **Stays,** 1.

**FINANCING OF REAL ESTATE DEVELOPMENTS.** See **Antitrust Acts,** 1.

**FINDINGS OF GUILT.** See **Constitutional Law,** VI, 1-3; **Evidence,** 2.

**FIRING OF EMPLOYEES.** See **Civil Rights Act of 1964,** 3.

**FIRST AMENDMENT.** See **Constitutional Law,** VII; **Jurisdiction.**

**FISHING RIGHTS.** See **States.**

**FLOOD PREVENTION AND CONTROL DISTRICTS.** See **Procedure,** 1.

**FOOD STAMP ACT OF 1964.** See also **Constitutional Law,** V, 1.

*Food stamp recipients' income—Disallowance of deduction for transportation expenses.*—Federal and state regulations that disallow a deduction for transportation expenses in connection with a job training program for purposes of computing income of food stamp recipients do not conflict with Act. Knebel v. Hein, p. 288.

**FOURTEENTH AMENDMENT.** See **Constitutional Law,** II, 3, 4; V; VII, 3, 4; VIII, 3; XI; XIII; **Jurisdiction; Mootness; Procedure,** 2; **Standing to Sue.**

**FOURTH AMENDMENT.** See **Constitutional Law,** VIII.

**FREEDOM OF SPEECH.** See **Constitutional Law,** VII.

**FREEDOM OF THE PRESS.** See **Stays,** 7.

**GAMBLING OFFENSES.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**GAS LEASES.** See **Stays,** 9.

**GENDER-BASED DISCRIMINATION.** See **Civil Rights Act of 1964,** 1; **Constitutional Law,** V, 2; XIII; **Mootness; Procedure,** 4; **Standing to Sue,** 1.

**GENERAL CONTRACTORS.** See **Davis-Bacon Act; Federal-State Relations,** 1; **Labor Management Relations Act.**

**GEORGIA.** See **Constitutional Law,** VIII, 3.

**GOVERNMENT APPEALS.** See **Appeals,** 2; **Constitutional Law,** VI.

**GOVERNMENT PROJECTS.** See **Davis-Bacon Act.**

**GRIEVANCE PROCEDURES.** See **Civil Rights Act of 1964,** 3.

**HARMLESS ERROR.** See **Evidence,** 2.

**HEARSAY EVIDENCE.** See **Evidence,** 2.

**HOUSING PROJECTS.** See **Constitutional Law,** V, 3; **Standing to Sue,** 2.

**HUNG JURY.** See **Constitutional Law,** VI, 4.

**IDAHO.** See **States.**

**IDENTIFICATION OF PATIENTS OBTAINING PRESCRIPTION DRUGS.** See **Constitutional Law,** II, 3; IX; **Physicians.**

**IDENTIFICATION REQUIREMENTS FOR WIRETAPS.** See **Omnibus Crime Control and Safe Streets Act of 1968,** 1–3.

**ILLEGAL GAMBLING.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**IMMIGRANT VISAS.** See **Aliens.**

**IMMIGRATION JUDGES.** See **Aliens.**

**IMMUNITY OF FEDERAL GOVERNMENT FROM STATE TAXATION.** See **Constitutional Law,** XII.

**IMMUNITY OF SCHOOL BOARDS FROM SUIT.** See **Constitutional Law,** IV.

**IMPARTIAL JURIES.** See **Criminal Law,** 1.

**IMPROPER RELIANCE ON PRIOR DECISION.** See **Procedure,** 1.

**IMPROVIDENT GRANT OF CERTIORARI.** See **Certiorari.**

**INCOME TAX DEDUCTIONS.** See **Internal Revenue Code.**

**INCOME TAXES.** See **Constitutional Law,** VIII, 1, 2; **Criminal Law,** 2; **Internal Revenue Code.**

**INCOME UNDER FOOD STAMP ACT OF 1964.** See **Constitutional Law,** V, 1; **Food Stamp Act of 1964.**

**INDEPENDENT CANDIDATES.** See **Injunctions,** 2.

**INDICTMENTS.** See **Appeals,** 2; **Constitutional Law,** VI, 4.

**"INFORMED CONSENT" REQUIREMENTS FOR ABORTIONS.** See **Abortions.**

**INFORMERS.** See **Constitutional Law,** II, 4.

**INJUNCTIONS.** See also **Abortions; Federal-State Relations,** 4; **Mootness; Stays,** 3, 9.

1. *Communist Party Presidential candidate—Name on ballot.*—Application for an injunction ordering that names of Communist Party candidates

**INJUNCTIONS**—Continued.

for President and Vice President be placed on ballot in Connecticut for November 2, 1976, election, is denied. Question of constitutionality of allegedly unduly burdensome filing procedures prescribed by Connecticut statute for access to ballot is too novel and uncertain to warrant single Justice's acting unilaterally. Moreover, applicants delayed unnecessarily in commencing suit attacking statute, and respondent state officials claim that an injunction at this time would have a chaotic and disruptive effect upon electoral process. Fishman v. Schaffer (MARSHALL, J., in chambers), p. 1325.

2. *Independent Presidential candidate—Name on ballot.*—Application for an injunction ordering that applicant McCarthy's name be placed on 1976 general election ballot in Texas as an independent candidate for President is granted, where District Court properly determined that Texas Election Code provision precluding candidates from gaining access to ballot as independents was unconstitutional, but denied requested relief on mistaken assumption that a lengthy signature-gathering process was only means of demonstrating requisite community support. McCarthy v. Briscoe (POWELL, J., in chambers), p. 1317.

**INJURY IN FACT.** See **Standing to Sue, 1.**

**IN-STATE SALES OF SECURITIES.** See **Constitutional Law, I.**

**INSTRUCTIONS TO JURY.** See **Criminal Law, 2.**

**INTERCEPTED COMMUNICATIONS.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**INTERFERENCE WITH RIGHT TO PRACTICE MEDICINE.** See **Physicians.**

**INTERNAL REVENUE CODE.** See also **Constitutional Law, VIII, 1, 2; Criminal Law, 2.**

1. *Income tax deductions—Corporate employer's delivery of promissory notes to trustees of employees' profit-sharing trust.*—Petitioner accrual-basis corporate taxpayer, by delivering fully secured promissory demand notes to trustees of its qualified employees' profit-sharing trust, is not entitled to income tax deductions therefor under § 404 (a) of 1954 Code, which allows a deduction for contributions "paid" by an employer to a profit-sharing plan in taxable year "when paid," and further allows deduction if contribution was a "payment . . . made" within a specified grace period following end of employer's taxable year. Don E. Williams Co. v. Commissioner, p. 569.

2. *Loss carryover—"Absorption" by capital gains as well as ordinary income.*—In carrying back a net operating loss under § 172 of Code to a

**INTERNAL REVENUE CODE**—Continued.

year in which taxpayer had both ordinary income and capital gains and employed alternative tax computation method of § 1201 (a), loss deduction available for carryover to a succeeding year is amount by which loss exceeds taxpayer's "taxable income"—ordinary income plus capital gains for prior year—loss carryover being "absorbed" by capital gains as well as ordinary income. United States v. Foster Lumber Co., p. 32.

3. *Loss carryover—Offset to taxable income—Capital gains.*—Absent any specific provision in Code excluding capital gains from "taxable income," Code's definitions of "taxable income" and gross income in §§ 63 (a) and 61 (a) require that both capital gains and ordinary income must be included in taxable income that § 172 directs must be offset by loss deduction before any loss excess can be found available for transfer forward to succeeding taxable year, and if Congress had intended to permit a loss deduction to offset only ordinary income when § 1201 (a) is used to compute tax, it could easily have said so. United States v. Foster Lumber Co., p. 32.

**INTERSTATE COMMERCE.** See **Constitutional Law,** I.

**INTERVENING DECISIONS OR LEGISLATION.** See **Certiorari,** 1.

**INTOXICATING LIQUORS.** See **Constitutional Law,** V, 2; XIII; **Mootness; Standing to Sue,** 1.

**INVASIONS OF PRIVACY.** See **Constitutional Law,** II, 3.

**INVENTORY NOTICES OF WIRETAPS.** See **Omnibus Crime Control and Safe Streets Act of 1968,** 4.

**INVIDIOUS DISCRIMINATION.** See **Constitutional Law,** V, 2.

**INVOLUNTARY CONFESSIONS.** See **Evidence,** 1.

**IRREPARABLE HARM.** See **Stays,** 5.

**JEOPARDY TAX ASSESSMENTS.** See **Constitutional Law,** VIII, 2.

**JOB TRAINING PROGRAMS.** See **Constitutional Law,** V, 1; **Food Stamp Act of 1964.**

**JONES ACT.** See **Appeals,** 1.

**JUDGES.**

*Circuit Justice—Designation of circuit judge to act in other circuit—Transfer of appeal.*—Application to Circuit Justice for a certificate of necessity under 28 U. S. C. § 291 (a) requesting that CHIEF JUSTICE designate judges from other circuits to sit in applicants' appeal to Court of Appeals for Second Circuit or for transfer of appeal to another court of appeals, because of alleged disqualification of all Second Circuit Judges, is denied. Meeropol v. Nizer (MARSHALL, J., in chambers), p. 1337.

**JUDGMENTS.** See **Procedure,** 3, 4.

**JUDGMENTS NOTWITHSTANDING VERDICT.** See **Federal Rules of Civil Procedure.**

**JUDICIAL AUTHORIZATION OF WIRETAPS.** See **Omnibus Crime Control and Safe Streets Act of 1968,** 1, 4.

**JURIES.** See **Criminal Law,** 1.

**JURISDICTION.** See also **Stays,** 3, 4; **Voting Rights Act of 1965.**

1. *Federal-question jurisdiction—Teacher's action for reinstatement and damages—Amount in controversy.*—Respondent teacher's complaint in his action against petitioner school board for reinstatement and damages, claiming that petitioner's refusal to rehire him violated his rights under First and Fourteenth Amendments, sufficiently pleaded jurisdiction under 28 U. S. C. § 1331. Though amount in controversy thereunder must exceed $10,000, even if District Court had chosen to award only compensatory damages, it was far from a "legal certainty" at time of suit that respondent would not have been entitled to more than that amount. Mt. Healthy City Board of Ed. v. Doyle, p. 274.

2. *Jurisdictional issue—Belated contention—Failure to preserve issue.*—In respondent teacher's action against petitioner school board for reinstatement and damages, claiming that petitioner's refusal to rehire him violated his rights under First and Fourteenth Amendments, petitioner in not raising an additional jurisdictional issue concerning 42 U. S. C. § 1983 until after this Court had granted certiorari and after petitioner had filed its reply brief, failed to preserve issue whether complaint stated a claim upon which relief could be granted against it. Because question involved is not of jurisdictional sort that Court raises on its own motion, it is assumed without deciding that respondent could sue under 28 U. S. C. § 1331 without regard to limitations imposed by § 1983. Mt. Healthy City Board of Ed. v. Doyle, p. 274.

**JURY INSTRUCTIONS.** See **Criminal Law,** 2.

**JUS TERTII STANDING.** See **Standing to Sue,** 1.

**JUSTICES OF THE PEACE.** See **Constitutional Law,** VIII, 3.

**LABOR.** See **Davis-Bacon Act; Federal-State Relations,** 1; **Labor Management Relations Act; Labor-Management Reporting and Disclosure Act of 1959; National Labor Relations Act.**

**LABOR MANAGEMENT RELATIONS ACT.** See also **Davis-Bacon Act; Federal-State Relations,** 1.

*Collective-bargaining agreement—Subcontractor's clause—Contributions to trust funds.*—Subcontractor's clause in collective-bargaining agreement between petitioner general contractor and carpenters' union, as construed

**LABOR MANAGEMENT RELATIONS ACT**—Continued.

by Oregon Supreme Court to require petitioner to make contributions to trust funds for employees measured by hours worked by his subcontractor's employees, benefits being payable only to carpenters employed by petitioner or other signatory employers, does not violate § 302 (a)(1) of Act prohibiting agreements of employers to pay money to any representative of their employees. But clause is authorized by §§ 302 (c)(5) and (6) exempting from this proscription agreements to pay money to trust funds jointly created and administered by trustees representing employer associations and a labor union for purpose of providing medical or hospital care, pensions, or pooled vacations for employees of signatory employers, or to defray costs of apprenticeship or other training programs. Walsh v. Schlecht, p. 401.

**LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.**

*Union constitution—Meeting-attendance requirement for holding union office.*—Provision of petitioner labor unions' constitution limiting eligibility for local union office to members who have attended at least one-half of local's regular meetings for three years previous to election of officers, violates § 401 (e) of Act, which provides that every union member in good standing shall be eligible to be a candidate and to hold office, subject to "reasonable qualifications." Steelworkers v. Usery, p. 305.

**LABOR UNIONS.** See **Constitutional Law**, VII, 1, 2; **Labor-Management Reporting and Disclosure Act of 1959; National Labor Relations Act**, 2.

**LACHES.** See **Stays**, 3.

**LACK OF PROPERLY PRESENTED FEDERAL QUESTION.** See **Appeals**, 1.

**LANDRUM-GRIFFIN ACT.** See **Labor-Management Reporting and Disclosure Act of 1959.**

**LAW GOVERNING MEANING OF COLLECTIVE-BARGANING AGREEMENT.** See **Federal-State Relations**, 1.

**LAW GOVERNING OWNERSHIP OF RIVERBED LANDS.** See **Federal-State Relations**, 2.

**LEGAL INCIDENCE OF STATE TAXES.** See **Constitutional Law**, XII.

**LESSENING OF COMPETITION.** See **Antitrust Acts**, 1.

**LIBERTY RIGHTS.** See **Constitutional Law**, II, 2, 3.

**LIFTING BAR OF STATUTE OF LIMITATIONS.** See **Limitation of Actions.**

**LIMITATION OF ACTIONS.** See also **Civil Rights Act of 1964, 2, 3.**

*Lifting bar—Restoration of lost remedy—Constitutionality.*—Lifting bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is not *per se* unconstitutional. Electrical Workers v. Robbins & Myers, Inc., p. 229.

**LIMITATION PERIOD FOR APPEALS.** See **Appeals,** 2.

**LIMITATIONS UPON ELIGIBILITY FOR UNION OFFICE.** See **Labor-Management Reporting and Disclosure Act of 1959.**

**LOSS CARRYBACKS OR CARRYOVERS.** See **Internal Revenue Code,** 2, 3.

**LOSS OF LIBERTY.** See **Constitutional Law,** II, 2.

**LOUISIANA.** See **Abortions.**

**LOW- AND MODERATE-INCOME HOUSING.** See **Constitutional Law,** V, 3; **Standing to Sue,** 2.

**MANDATES.** See **Procedure,** 3, 4.

**MASSACHUSETTS.** See **Federal-State Relations,** 3.

**MEDICAL TREATMENT OF PRISONERS.** See **Constitutional Law,** III.

**MEETING-ATTENDANCE REQUIREMENTS FOR HOLDING UNION OFFICE.** See **Labor-Management Reporting and Disclosure Act of 1959.**

**MERGERS.** See **Antitrust Acts,** 1.

**MID-ATLANTIC OUTER CONTINENTAL SHELF.** See **Stays,** 9.

**MIRANDA WARNINGS.** See **Constitutional Law,** X.

**MISSISSIPPI.** See **Voting Rights Act of 1965.**

**MISTRIAL.** See **Constitutional Law,** VI, 4.

**MONOPOLIES.** See **Antitrust Acts,** 1.

**MOOTNESS.**

*Prohibition against sale of beer—Relief against gender-based age differential—Appellant's becoming 21.*—Since only declaratory and injunctive relief was sought against enforcement of allegedly discriminatory Oklahoma statutory scheme prohibiting sale of 3.2% beer to males under age of 21 and to females under age of 18, controversy has been mooted as to appellant male who became 21 after this Court had noted probable jurisdiction. Craig v. Boren, p. 190.

**MOTIONS FOR LEAVE TO FILE ORIGINAL COMPLAINT.** See **States.**

**MOTIONS TO RECALL MANDATE.** See **Procedure,** 3.

**MURDER.** See **Criminal Law,** 1.

**NARCOTICS.** See **Constitutional Law,** II, 3; IX; **Physicians.**

**NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.** See **Stays,** 9.

**NATIONAL FORESTS.** See **Constitutional Law,** XII.

**NATIONAL LABOR RELATIONS ACT.**

1. *Poultry truck drivers as "employees" under Act.*—Truck drivers employed by petitioner operators of poultry business to deliver feed from petitioners' feed-mill for petitioners' chicks supplied to independent farms under contract, are "employees" within coverage of Act, not agricultural laborers. Drivers' status is determined by character of work that they perform for their employer, which work is not incidental to any of their employers' agricultural activities, feed-mill operation being nonagricultural and storage and use of feed on independent farms being agricultural activity performed by independent farmers not by petitioners. Bayside Enterprises, Inc. v. NLRB, p. 298.

2. *Unfair labor practice—Union's refusal to install climate control units at construction site—Secondary activity.*—Respondent union's refusal to install at construction site climate control units, which under subcontract job specifications were piped at factory, on ground that collective-bargaining agreement between respondent and subcontractor provided that pipe threading and cutting were to be performed at jobsite, was secondary activity prohibited by § 8 (b) (4) (B), rather than primary activity beyond reach of that provision. Existence of a work-preservation agreement is not an adequate defense to a § 8 (b) (4) (B) unfair labor practice charge. NLRB v. Pipefitters, p. 507.

**NECESSITY FOR STAY.** See **Stays,** 1.

**NEGROES.** See **Civil Rights Act of 1964,** 2; **Constitutional Law,** V, 3; **Standing to Sue,** 2.

**NET OPERATING LOSS CARRYBACKS OR CARRYOVERS.** See **Internal Revenue Code,** 2, 3.

**NEWS MEDIA.** See **Stays,** 7.

**NEWSPAPER EDITORS AND REPORTERS.** See **Stays,** 2.

**NEW YORK.** See **Constitutional Law,** 1; **Federal-State Relations,** 4.

**NEW YORK STATE CONTROLLED SUBSTANCES ACT OF 1972.** See **Constitutional Law,** II, 3; IX; **Physicians.**

**NONCOMPLIANCE WITH MANDATE.** See **Procedure,** 4.

**NONTENURED POLICE OFFICERS.** See **Procedure,** 2.

**OCCUPATIONAL SAFETY AND HEALTH ACT.** See **Stays,** 6.

**OHIO.** See **Procedure,** 1.

**OIL AND GAS INTERESTS IN LAND.** See **Appeals,** 1.

**OIL LEASES.** See **Stays,** 9.

**OIL TANKERS.** See **Stays,** 8.

**OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.**

1. *Wiretap application—Failure to comply with identification requirement as warranting suppression of evidence.*—Although Government was required under 18 U. S. C. § 2518 (1)(b)(iv) to identify certain respondents (who were subsequently charged with federal gambling offenses) in wiretap application, failure to do so under circumstances did not warrant suppression under § 2518 (10)(a)(i) requiring suppression of evidence derived from wiretap if "the communication was unlawfully intercepted," since identification in an intercept application of all those likely to be overheard in incriminating conversations does not play a "substantive role" with respect to judicial authorization of intercept orders and hence does not impose a limitation on use of intercept procedures. United States v. Donovan, p. 413.

2. *Wiretap application—Failure to comply with identification requirement as warranting suppression of evidence.*—Suppression of evidence derived from wiretap was not justified under 18 U. S. C. § 2518 (10)(a)(i), which requires suppression of such evidence if "the communication was unlawfully intercepted," with respect to certain respondents charged with federal gambling offenses simply because Government inadvertently omitted their names from comprehensive list of all identifiable persons whose conversations had been overheard. United States v. Donovan, p. 413.

3. *Wiretap application—Identification requirement.*—Title 18 U. S. C. § 2518 (1)(b)(iv), which is part of Title III of Act and which requires Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is not satisfied when wiretap application identifies only "principal target" (usually individual whose phone is monitored) of interception, but Government is required to name *all* individuals who it has probable cause to believe are engaged in criminal activity under investigation and whose conversations it expects will be intercepted over target telephone. Neither language nor structure of Title III nor its legislative history supports interpretation that Congress intended to remove from identification requirement those suspects whose intercepted communications

**OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968—**
Continued.

originated on a telephone other than that listed in wiretap application. United States v. Donovan, p. 413.

4. *Wiretap application—Requirement as to inventory notice.*—Under 18 U. S. C. § 2518 (8)(d), requiring judge to whom a wiretap application is made to cause to be served on persons named in wiretap order or application an inventory, which must give notice of entry of order or application, state disposition of application, and indicate whether communications were intercepted, and further providing that judge may order similar notice to other parties to intercepted communications if he concludes that such action is in interest of justice, Government has a statutory responsibility to inform issuing judge of identities of persons whose conversations were overheard in course of interception, thus enabling him to decide whether they should be served with notice of interception. United States v. Donovan, p. 413.

**OPEN MEETINGS OF SCHOOL BOARDS.** See **Constitutionl Law,** VII, 1, 2.

**OPERATING LOSS CARRYBACKS OR CARRYOVERS.** See **Internal Revenue Code,** 2, 3.

**ORDERS DISMISSING INDICTMENTS.** See **Appeals,** 2.

**ORDERS OF COMMITMENT FOR CONTEMPT.** See **Stays,** 2.

**OREGON.** See **Federal-State Relations,** 2; **States.**

**ORIGINAL ACTIONS.** See **States.**

**OUT-OF-STATE SALES OF SECURITIES.** See **Constitutional Law,** I.

**OVERSTAY OF TOURIST VISA.** See **Aliens.**

**OWNERSHIP OF RIVERBED LANDS.** See **Federal-State Relations,** 2.

**PARENT'S OBLIGATION OF CHILD SUPPORT.** See **Procedure,** 4.

**PAROLE REVOCATION HEARINGS.** See **Constitutional Law,** II, 2.

**PAROLE VIOLATOR WARRANTS.** See **Constitutional Law,** II, 2.

**PATIENT IDENTIFICATION REQUIREMENTS.** See **Constitutional Law,** II, 3; IX; **Physicians.**

**PERMANENT RESIDENT ALIENS.** See **Aliens.**

**PHYSICIANS.** See also **Constitutional Law,** II, 3; IX.

*Prescription drugs—Patient identification requirement—Interference with practice.*—Appellee doctors' contention that New York statute requiring

**PHYSICIANS**—Continued.

that identification of patients obtaining prescription drugs be recorded in centralized state health department computer file impairs their right to practice medicine free from unwarranted state interference is without merit, whether it refers to statute's impact on their own procedures, which is no different from impact of prior statute, or refers to patients' concern about disclosure that Court has rejected. Whalen v. Roe, p. 589.

**"PLAIN, SPEEDY AND EFFICIENT" REMEDY.** See **Federal-State Relations**, 4.

**PLEA BARGAINING.** See **Evidence**, 1.

**POLICE OFFICERS.** See **Procedure**, 2.

**POLICE POWERS.** See **Constitutional Law**, IX.

**POSSESSORY INTEREST TAXES.** See **Constitutional Law**, XII.

**POULTRY TRUCK DRIVERS.** See **National Labor Relations Act**, 1.

**PRE-EMPTION.** See **Stays**, 8.

**PREFABRICATED HOUSES.** See **Antitrust Acts**, 1.

**PREGNANCY-RELATED DISABILITIES.** See **Civil Rights Act of 1964**, 1.

**PRELIMINARY INJUNCTIONS.** See **Stays**, 9.

**PRESCRIPTION DRUGS.** See **Constitutional Law**, II, 3; IX; **Physicians.**

**PRESIDENTIAL ELECTIONS.** See **Injunctions.**

**"PRINCIPAL TARGET" OF WIRETAPS.** See **Omnibus Crime Control and Safe Streets Act of 1968**, 3.

**PRIOR RESTRAINTS.** See **Constitutional Law**, VII, 1, 2.

**PRISONERS.** See **Constitutional Law**, III.

**PRIVACY RIGHTS.** See **Constitutional Law**, II, 3.

**PROCEDURE.** See also **Evidence; Federal Rules of Civil Procedure; Federal-State Relations**, 2; **Jurisdiction**, 1.

1. *Constitutional challenges to state statute—Trial court's improper reliance on prior decision.*—Where District Court rejected all of appellants' challenges to constitutionality of an Ohio statute establishing procedures for organization and governance of conservancy districts (political subdivisions of State invested with power to carry out flood prevention and control measures), on sole ground that such challenges were foreclosed by *Orr* v. *Allen*, 248 U. S. 35, but none of issues presented was raised or

**PROCEDURE**—Continued.

passed upon in *Orr,* District Court's judgment is reversed and case is remanded for a full consideration of such issues. Concerned Citizens v. Pine Creek District, p. 651.

2. *Constitutional claim—Effect of failure to raise essential question.*—Respondent's claim under Due Process Clause of Fourteenth Amendment that before being dismissed from his nontenured position as city policeman he was entitled to a hearing due to stigmatizing effect of certain information in his personnel file about a suicide attempt while he was a police trainee, is defeated by failure of respondent or courts below to raise a question about substantial accuracy of report of suicide attempt. Only if employer is alleged to have created and disseminated a false and defamatory impression about employee in connection with his termination, or a trial court so finds, is such a hearing required. Codd v. Velger, p. 624.

3. *Motion to recall mandate—Leave to file Fed. Rule Civ. Proc. 60 (b) motion.*—On motion to recall Supreme Court mandate affirming a District Court judgment against movant, and for leave to file a motion under Fed. Rule Civ. Proc. 60 (b), motion to recall is denied because District Court may take appropriate action on Rule 60 (b) motion without leave of this Court. Standard Oil Co. of Cal. v. United States, p. 17.

4. *Noncompliance with mandate—Vacation of judgment and remand.*—Where Utah Supreme Court did not comply with this Court's mandate in *Stanton* v. *Stanton,* 421 U. S. 7, that it resolve how Utah was to eliminate discrimination between genders in Utah statute, which establishes 21 as age of majority for males, and 18 as age for females, as applied to a parent's obligation of child support, but instead held that statute was constitutional as applied to females without considering discrimination, that court's judgment is vacated and case is again remanded for further proceedings. Stanton v. Stanton, p. 501.

**PROFIT-SHARING TRUSTS.** See **Internal Revenue Code,** 1.

**PROHIBITION AGAINST SALE OF BEER.** See **Constitutional Law,** V, 2; XIII; **Mootness; Standing to Sue,** 1.

**PROMISSORY DEMAND NOTES.** See **Internal Revenue Code,** 1.

**PROPERTY RIGHTS.** See **Appeals,** 1; **Federal-State Relations,** 2.

**PROPERTY TAXES.** See **Constitutional Law,** XII.

**PUBLIC MEETINGS OF SCHOOL BOARDS.** See **Constitutional Law,** VII, 1, 2.

**RACIAL DISCRIMINATION.** See **Civil Rights Act of 1964,** 2; **Constitutional Law,** V, 3; **Standing to Sue,** 2.

**REAL ESTATE DEVELOPMENTS.** See **Antitrust Acts,** 1.

**REAL PROPERTY RIGHTS.** See **Appeals**, 1; **Federal-State Relations**, 2.

**REAL PROPERTY TAXES.** See **Constitutional Law**, XII.

**"REASONABLE QUALIFICATIONS" ON HOLDING UNION OFFICE.** See **Labor-Management Reporting and Disclosure Act of 1959.**

**RECALL OF MANDATES.** See **Procedure**, 3.

**REDEMPTION OF PROPERTY.** See **Appeals**, 1.

**REDISTRICTING PLANS.** See **Voting Rights Act of 1965.**

**REFUSAL TO DISCLOSE NEWS SOURCES.** See **Stays**, 2.

**REFUSAL TO REHIRE TEACHER.** See **Constitutional Law**, VII, 3, 4; **Jurisdiction.**

**REGULATION OF DRINKING.** See **Constitutional Law**, V, 2; XIII; **Mootness; Standing to Sue**, 1.

**REGULATION OF OIL TANKERS.** See **Stays**, 8.

**RELIEF FROM JUDGMENTS.** See **Procedure**, 3, 4.

**REMAND TO STATE COURT.** See **Procedure**, 4; **Stays**, 4.

**REMITTITURS.** See **Appeals**, 3.

**REMOVAL OF CAUSES.** See **Stays**, 4.

**REPORTERS.** See **Stays**, 2.

**RESTORATION OF LOST REMEDY.** See **Limitation of Actions.**

**REZONING.** See **Constitutional Law**, V, 3; **Standing to Sue**, 2.

**RIGHT TO COUNSEL.** See **Constitutional Law**, XI.

**RIGHT TO FAIR TRIAL.** See **Constitutional Law**, II, 4; XI.

**RIGHT TO HEARING ON DISMISSAL FROM EMPLOYMENT.** See Procedure, 2.

**RIGHT TO LIBERTY.** See **Constitutional Law**, II, 2, 3.

**RIGHT TO PAROLE REVOCATION HEARING.** See **Constitutional Law**, II, 2.

**RIGHT TO PRACTICE MEDICINE.** See **Physicians.**

**RIGHT TO PRIVACY.** See **Constitutional Law**, II, 3.

**RIGHT TO REDEEM PROPERTY.** See **Appeals**, 1.

**RIPARIAN RIGHTS.** See **Federal-State Relations**, 2.

**RIVERBEDS.** See **Federal-State Relations**, 2.

**RIVERS.** See **States.**

**RULES OF APPELLATE PROCEDURE.** See **Appeals,** 2.

**RULES OF CIVIL PROCEDURE.** See **Federal Rules of Civil Pro-Procedure,** 2.

**RUNNING OF LIMITATIONS PERIOD.** See **Civil Rights Act of 1964,** 2, 3.

**SALE OF BEER.** See **Constitutional Law,** V, 2; XIII; **Mootness; Standing to Sue.**

**SALES OF SECURITIES.** See **Constitutional Law,** I.

**SALES TAXES.** See **Federal-State Relations,** 4.

**SCHOOL BOARDS.** See **Constitutional Law,** IV; VII; **Jurisdiction.**

**SCRUPLES AGAINST DEATH PENALTY.** See **Criminal Law,** 1.

**SEALED BIDS FOR OIL AND GAS LEASES.** See **Stays,** 9.

**SEAMEN.** See **Appeals,** 1.

**SEARCHES AND SEIZURES.** See **Constitutional Law,** VIII; **Stays,** 6.

**SEARCH WARRANTS.** See **Constitutional Law,** VIII, 3.

**SECONDARY BOYCOTTS.** See **National Labor Relations Act,** 2.

**SECRETARY OF THE INTERIOR.** See **Stays,** 9.

**SECURITIES TRANSACTIONS.** See **Constitutional Law,** I.

**SELF-INCRIMINATION.** See **Constitutional Law,** X.

**SENTENCES.** See **Criminal Law,** 1.

**SEX DISCRIMINATION.** See **Civil Rights Act of 1964,** 1; **Constitutional Law,** V, 2; XIII; **Mootness; Procedure,** 4; **Standing to Sue,** 1.

**SHERMAN ACT.** See **Antitrust Acts,** 2.

**SIXTH AMENDMENT.** See **Constitutional Law,** XI.

**SOCIAL SECURITY ACT.** See **Constitutional Law,** II, 1.

**STANDING TO SUE.**

1. *Prohibition against sale of beer—Relief against gender-based differential—Vendor.*—Appellant licensed vendor of 3.2% beer has standing to make equal protection challenge to enforcement of Oklahoma statutory scheme prohibiting sale of 3.2% beer to males under age of 21 and to females under age of 18. Craig v. Boren, p. 190.

2. *Real estate developer—Prospective resident—Action challenging denial of rezoning for housing project.*—Respondent nonprofit developer, which had contracted to purchase tract within petitioner village to build racially

**STANDING TO SUE**—Continued.

integrated low- and moderate-income housing, and at least one individual minority respondent, who allegedly would qualify for housing, have standing to bring action alleging that village's denial of rezoning necessary for housing project was racially discriminatory and violated Equal Protection Clause of Fourteenth Amendment and Fair Housing Act of 1968. Arlington Heights v. Metropolitan Housing Corp., p. 252.

**STATE LAW AS GOVERNING OWNERSHIP OF RIVERBED LANDS.** See **Federal-State Relations,** 2.

**STATE PRISONERS.** See **Constitutional Law,** III.

**STATE REGULATION OF OIL TANKERS.** See **Stays,** 8.

**STATES.**

*Fishing rights—Original complaint.*—Without determining whether bill of complaint states a claim upon which relief can be granted, Idaho's motion for leave to file bill is granted to extent that complaint prays that Court declare Idaho entitled as against Oregon and Washington to an equitable portion of upriver anadromous fishery of Columbia River Basin and that Court determine such portion on evidence, and award costs and incidental relief, but is denied in all other respects. Idaho *ex rel.* Andrus v. Oregon, p. 163.

**STATE SALES TAXES.** See **Federal-State Relations,** 4.

**STATE'S POLICE POWERS.** See **Constitutional Law,** IX.

**STATE TRANSFER TAXES ON SECURITIES TRANSACTIONS.** See **Constitutional Law,** I.

**STATE USE OR PROPERTY TAXES.** See **Constitutional Law,** XII.

**STATUTES OF LIMITATION.** See **Civil Rights Act of 1964,** 2, 3; **Limitation of Actions.**

**STATUTORY CLASSIFICATIONS.** See **Constitutional Law,** II, 1.

**STAYS.**

1. *Absence of compelling necessity.*—Application for bail pending certiorari or for stay of Arizona Supreme Court's mandate is denied absent any showing of compelling necessity for a stay, and where it is doubtful if applicant's petition for certiorari will be granted and there is a question as to finality of Arizona Supreme Court's judgment sought to be reviewed. Bateman v. Arizona (REHNQUIST, J., in chambers), p. 1302.

2. *Commitment for contempt—Newspaper editors and reporters—Refusal to disclose news source.*—Application for stay, pending disposition of petition for certiorari, of California court orders of commitment against applicant newspaper editors and reporters entered pursuant to contempt

**STAYS**—Continued.

judgments for refusing to disclose sources for certain news articles, and for a temporary stay until this Court acts on such request for a stay, is denied where applicants have twice unsuccessfully sought review in this Court on similar grounds. Gruner v. Superior Court (REHNQUIST, J., in chambers), p. 1314.

3. *Denial of injunctive relief—Supreme Court—Lack of jurisdiction.*—Application for a partial stay of a three-judge District Court's order and judgment denying injunctive relief to applicants on ground of laches is denied, since a direct appeal to this Court does not lie under 28 U. S. C. § 1253 and hence Court is without jurisdiction to grant requested relief. McCarthy v. Briscoe (POWELL, J., in chambers), p. 1316.

4. *District Court—Remand to state court.*—Application for stay of District Court's order pursuant to 28 U. S. C. § 1447 (c) remanding an alleged diversity class action to state court on ground that District Court had no jurisdiction of action, is denied, since appellate review of a remand order based on § 1447 (c), whether erroneous or not, is barred by § 1447 (d). Volvo Corp. v. Schwarzer (REHNQUIST, J., in chambers), p. 1331.

5. *Executions—Irreparable harm—Mootness.*—Application for stay of mandate is granted pending disposition of a petition for rehearing, since, if executions were carried out before that petition could be acted on, petitioners would be irreparably harmed and cases would be moot, and since granting of stay will not prejudice respondent States' interests. Gregg v. Georgia (POWELL, J., in chambers), p. 1301.

6. *Injunction against searches under Occupational Safety and Health Act.*—Application by Secretary of Labor for stay of a three-judge District Court's injunction against further searches pursuant to § 8 (a) of OSHA, which allows warrantless entry and inspection of work places for OSHA violations, is granted, pending timely filing of an appeal and disposition thereof by this Court, insofar as it affects persons other than respondent. Act, being presumptively constitutional, should remain in effect pending this Court's final decision on merits. Marshall v. Barlow's, Inc. (REHNQUIST, J., in chambers), p. 1347.

7. *Injunction granting news media access to jail.*—Application by a county sheriff for stay of District Court's injunction granting personnel of respondent television-radio station and other news media representatives access to county jail, is granted pending applicant's timely filing of a petition for certiorari and disposition thereof by this Court. Issue to be raised in petition as to whether doctrine of *Pell* v. *Procunier,* 417 U. S. 817, and *Saxbe* v. *Washington Post Co.,* 417 U. S. 843, that press is entitled to no greater access to a jail than public applies to this case is of sufficient

**STAYS**—Continued.

importance to surmount threshold barrier confronting stay applications, *viz.*, reasonable likelihood that petition for certiorari will be granted. Houchins v. KQED, Inc. (REHNQUIST, J., in chambers), p. 1341.

8. *State regulation of oil tankers—Pre-emption—Reference to full Court.*—Application for stay of District Court's order enjoining enforcement of Washington State statute regulating oil tankers on ground that it was pre-empted by federal statutes, is referred to full Court because of sufficient complexity of issues involved and uncertainty as to their resolution, but in meantime stay issued by District Court itself and due to expire shortly is continued until further order of this Court. Evans v. Atlantic Richfield Co. (REHNQUIST, J., in chambers), p. 1334.

9. *Vacation of stay—Absence of "exceptional circumstances"—Injunction against oil and gas leases.*—Application to vacate Court of Appeals' stay of District Court's order preliminarily enjoining Secretary of the Interior from opening sealed bids for oil and gas leases of submerged lands under Mid-Atlantic Outer Continental Shelf on ground that environmental impact statement required by National Environmental Policy Act of 1969 before leasing program could go forward was materially deficient, is denied absent "exceptional circumstances" warranting Circuit Justice's vacating a stay. New York v. Kleppe (MARSHALL, J., in chambers), p. 1307.

**STIGMATIZATION OF EMPLOYEES.** See **Procedure,** 2.

**STOCK EXCHANGES.** See **Constitutional Law,** I.

**SUBCONTRACTORS' CLAUSES.** See **Davis-Bacon Act; Federal-State Relations,** 1; **Labor Management Relations Act.**

**SUBCONTRACTS.** See **National Labor Relations Act,** 2.

**SUBMERGED LANDS.** See **Stays,** 9.

**SUPPRESSION OF CONFESSION AS EVIDENCE.** See **Constitutional Law,** X.

**SUPPRESSION OF WIRETAP EVIDENCE.** See **Omnibus Crime Control and Safe Streets Act of 1968,** 1, 2.

**SUPREMACY CLAUSE.** See **Constitutional Law,** XII.

**SUPREME COURT.** See also **Procedure,** 3, 4; **Stays,** 3.

1. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Third Circuit, p. 875.

2. Assignments of Mr. Justice Clark (retired) to the United States Court of Appeals for the Second Circuit, p. 908.

3. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Fourth Circuit, p. 934.

**SUPREME COURT**—Continued.

4. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Eighth Circuit, p. 934.

5. Assignments of Mr. Justice Clark (retired) to the United States Court of Appeals for the Ninth Circuit, pp. 988, 1079.

6. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the District of Columbia Circuit, p. 1055.

7. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, p. 1055.

**TAXABLE INCOME.** See **Internal Revenue Code.**

**TAX ASSESSMENTS AND LEVIES.** See **Constitutional Law,** VIII, 1, 2.

**TAXES.** See **Constitutional Law** I; VIII, 1, 2; **Criminal Law,** 2; **Federal-State Relations,** 4; **Internal Revenue Code.**

**TAX INJUNCTION ACT.** See **Federal-State Relations,** 4.

**TAX SALES.** See **Appeals,** 1.

**TEACHERS.** See **Constitutional Law,** VII; **Jurisdiction,** 1, 2.

**TELEPHONE WIRETAPS.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**TEXAS.** See **Injunctions,** 2.

**THIRD-PARTY STANDING.** See **Standing to Sue,** 1.

**THREE-JUDGE COURTS.** See **Stays,** 3.

**3.2% BEER.** See **Constitutional Law,** V, 2; XIII; **Mootness; Standing to Sue,** 1.

**TIMELINESS OF APPEALS.** See **Appeals,** 2.

**TOLLING OF LIMITATION PERIOD.** See **Civil Rights Act of 1964,** 2, 3.

**TOURIST VISAS.** See **Aliens.**

**TRANSFER OF APPEALS.** See **Judges.**

**TRANSFER TAXES ON SECURITIES TRANSACTIONS.** See **Constitutional Law,** I.

**TRANSPORTATION EXPENSES AS DEDUCTIBLE FROM FOOD STAMP RECIPIENTS' INCOME.** See **Constitutional Law,** V, 1; **Food Stamp Act of 1964.**

**TREBLE DAMAGES.** See **Antitrust Acts 1; Federal Rules of Civil Procedure.**

**TRIAL COURT'S IMPROPER RELIANCE ON PRIOR DECISION.** See **Procedure, 1.**

**TRIALS.** See **Criminal Law, 2.**

**TRUCK DRIVERS.** See **National Labor Relations Act, 1.**

**TRUST FUNDS FOR EMPLOYEES.** See **Davis-Bacon Act; Labor Management Relations Act.**

**TWENTY-FIRST AMENDMENT.** See **Constitutional Law, XIII.**

**TYING ARRANGEMENTS.** See **Antitrust Acts, 1.**

**UNDERCOVER AGENTS' MEETING WITH ACCUSED'S COUNSEL.** See **Constitutional Law, XI.**

**UNFAIR LABOR PRACTICES.** See **Constitutional Law, VII, 1; National Labor Relations Act.**

**UNIONS.** See **Constitutional Law, VII, 1, 2; Labor-Management Reporting and Disclosure Act of 1959; National Labor Relations Act, 2.**

**UNITED STATES FOREST SERVICE.** See **Constitutional Law, XII.**

**UNLAWFUL EMPLOYMENT PRACTICES.** See **Civil Rights Act of 1964.**

**UNLAWFUL INTERCEPTION OF CONVERSATIONS.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**UNTENURED TEACHERS.** See **Constitutional Law, VI, 3; Jurisdiction.**

**USE TAXES.** See **Constitutional Law, XII.**

**UTAH.** See **Procedure, 4.**

**VACATION OF INJUNCTIONS.** See **Abortions.**

**VACATION OF JUDGMENTS.** See **Procedure, 4.**

**VACATION OF STAY.** See **Stays, 9.**

**VENDORS OF BEER.** See **Standing to Sue, 1.**

**VOLUNTARINESS OF CONFESSIONS.** See **Evidence, 1.**

**VOTING RIGHTS ACT OF 1965.**

*Scope of local district court's inquiry—"Coverage" questions.*—A local district court's inquiry in an action under § 5 of Act claiming that new voting procedures of a State or political subdivision thereof fail to comply with § 5 procedures, is limited to determining whether a voting requirement

**VOTING RIGHTS ACT OF 1965**—Continued.

is covered by § 5 but has not been subjected to required federal scrutiny. Hence, here District Court for Southern District of Mississippi, in an action by Attorney General under § 5 challenging redistricting plan submitted to him by a Mississippi county and to which he had objected, erred in deciding that such plan was unconstitutional and that a new plan submitted to Attorney General as ordered by court but not approved by him was constitutional, and court should have determined only whether county could be enjoined from holding elections under a new plan because it had not been cleared under § 5. United States v. Board of Supervisors, p. 642.

**WARRANTLESS ENTRY AND INSPECTION OF WORK PLACES.** See **Stays,** 6.

**WARRANTLESS SEARCHES AND SEIZURES.** See **Constitutional Law,** VIII, 1, 2.

**WARRANTS.** See **Constitutional Law,** VIII, 3.

**WASHINGTON.** See **States; Stays,** 8.

**WATER RIGHTS.** See **States.**

**WEST VIRGINIA.** See **Appeals,** 1.

**WILLAMETTE RIVER.** See **Federal-State Relations,** 2.

**WILLFUL FILING OF FALSE INCOME TAX RETURNS.** See **Criminal Law,** 2.

**WIRETAP APPLICATIONS.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

**WISCONSIN.** See **Constitutional Law,** VII, 1, 2.

**WIVES' SOCIAL SECURITY BENEFITS.** See **Constitutional Law,** II, 1.

**WORDS AND PHRASES.**

1. *"Employee."* § 2 (3), National Labor Relations Act, 29 U. S. C. § 152 (3). Bayside Enterprises, Inc. v. NLRB, p. 298.

2. *"Paid."* § 404 (a), Internal Revenue Code of 1954, 26 U. S. C. § 404 (a). Don E. Williams Co. v. Commissioner, p. 569.

3. *"Payment."* § 404 (a), Internal Revenue Code of 1954, 26 U. S. C. § 404 (a). Don E. Williams Co. v. Commissioner, p. 569.

4. *"Reasonable qualifications."* § 401 (e), Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 481 (e). Steelworkers v. Usery, p. 305.

**WORK-PRESERVATION AGREEMENTS.** See **National Labor Relations Act, 2.**

**WORK STOPPAGES.** See **National Labor Relations Act, 2.**

**WRONGFUL ADMISSION OF HEARSAY EVIDENCE.** See **Evidence, 2.**

**ZONING.** See **Constitutional Law, V, 3; Standing to Sue, 2.**

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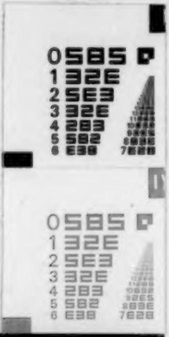
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